(16)

No. 03-1423
Title: Darin L. Muehler, et al., Petitioners
v.
Iris Mena
Docketed: April 14, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-56673)
Decision Date: June 23, 2003
Rehearing Denied: January 14, 2004
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 13 2004	Petition for a writ of certiorari filed. (Response due May 14, 2004)
May 12 2004	Brief amicus curiae of League of California Cities filed.
May 13 2004	Brief of respondent Iris Mena in opposition filed.
May 13 2004	Motion for leave to file amicus brief filed by Police Officers Research Association of California Legal Defense Fund.
May 24 2004	Reply of petitioners Darin L. Muehler, et al. filed. (Distributed)
May 25 2004	DISTRIBUTED for Conference of June 10, 2004.
Jun 14 2004	Motion for leave to file amicus brief filed by Police Officers Research Association of California Legal Defense Fund GRANTED.
Jun 14 2004	Petition GRANTED.
Jul 19 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including August 30, 2004.
Aug 27 2004	Motion for leave to file amici brief filed by Police Officers Research Association of California Legal Defense Fund.
Aug 30 2004	Brief amicus curiae of United States filed.
Aug 30 2004	Brief of petitioners Darin L. Muehler, et al. filed.
Aug 30 2004	Joint appendix filed.
Aug 30 2004	Brief amici curiae of National League of Cities, et al. filed.
Sep 22 2004	Extension of time within which to file respondent's brief on the merits to and including November 3, 2004.
Sep 28 2004	Motion for leave to file amicus brief filed by Police Officers Research Association of California Legal Defense Fund GRANTED.
Sep 29 2004	SET FOR ARGUMENT ON Wednesday, December 8, 2004.
Sep 30 2004	CIRCULATED.
Sep 30 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 1 2004	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 1 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Nov 2 2004	Record received from U.S.D.C. - Central Dist. of California (2 boxes)
Nov 3 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Nov 3 2004	Brief amici curiae of National Latino Officers Association, et al. filed. (Distributed)

Nov 3 2004	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Nov 3 2004	Brief of respondent Iris Mena in opposition filed. (Distributed)
Nov 24 2004	Reply of petitioners Darin L. Muehler, et al. filed. (Distributed)

Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of this Court's repeated holdings that mere police questioning does not constitute a seizure, the Ninth Circuit erred in ruling that law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional "seizure" if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity.

2. Whether, in light of this Court's ruling in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted, the Ninth Circuit erred in ruling that a two to three hour detention of the occupant of a suspected gang safe-house while officers searched for concealed weapons and other evidence of a gang-related drive-by shooting was unconstitutional because the occupant was initially detained at gun-point and handcuffed for the duration of the search.

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1 petitioners state that all parties to the proceeding in the court whose judgment is sought to be review are, in addition to those listed in the caption above:

Jose E. Mena, as plaintiff below;

City of Simi Valley
Randy G. Adams
Marvin Hodges
Roy Jones
Vincent Allegra
Alan McCord
Richard Thomas
Ronald Chambers
William Lappin
Arnold Baynard
Jeffrey Dominick
Jack Greenburg
Richard Lamb
Frank Ahlvers
John Adamczyk
Tim Brown, as defendants below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Darin L. Muehler and Robert Brill respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioners' motion for summary judgment on qualified immunity grounds (*Mena I*) was reported at 226 F.3d 1031 (9th Cir. 2000) and is reproduced in the appendix (Pet. App.) at 55a-72a. The judgment of the district court was unpublished and is reproduced at Pet. App. 48a-54a. The order of the trial court denying petitioners' Fed. R. Civ. P. 59(e) motion to alter or amend judgment was unpublished and is reproduced at Pet. App. 35a-47a. The opinion of the court of appeals affirming the trial court's judgment against petitioners (*Mena II*) was published at 332 F.3d 1255 (9th Cir. 2003) and is reproduced at Pet. App. 1a-22a. The order of the court of appeals denying rehearing en banc was published at 354 F.3d 1015 (9th Cir. 2004) and is reproduced at Pet. App. 23a-34a.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2003. An order denying petitioners' petition for rehearing and suggestion for rehearing en banc was entered on January 14, 2004. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1983 of Title 42 to the United States Code provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case presents two recurring constitutional questions of great significance to law enforcement officers throughout the nation. The first is whether officers who have lawfully detained an individual engage in an additional, unconstitutional "seizure" if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity. The second is whether the detention of individuals for two to three hours

while a valid search warrant for weapons is fully executed is rendered constitutionally impermissible if the individuals were initially detained at gun-point and handcuffed for the duration of the search. The Ninth Circuit answered both questions in the affirmative, holding not only that police officers executing a search warrant violated the Fourth Amendment by detaining occupants of the premises in handcuffs and by questioning them about their immigration status, but also that the Fourth Amendment violations were so "clearly established" as to negate the officers' qualified immunity defense. These plainly erroneous rulings warrant plenary review by this Court.

1. During January and February of 1998, petitioners Darin Muehler and Robert Brill were officers with the Simi Valley Police Department ("SVPD") assigned to a special gang unit. See Appellant's Excerpts of Record (Appellant's Excerpts of R.) at 256, 258. On January 13, 1998, petitioners were assigned to investigate a gang-related drive-by shooting. *Id.* at 258. Three assailants in a light green Toyota Tercel fired multiple shots at individuals standing in front of 355 Bonita Drive in Simi Valley. *Id.* Soon after the shooting, police stopped a light green Toyota Tercel with three occupants: Delfino Vasquez, Ricardo Bravo, and Raymond Romero. *Id.* at 259. Both Vasquez and Bravo confessed to the shooting, while Romero invoked his Miranda rights in response to questioning. *Id.* at 259-60. During their investigation, petitioners discovered that the shooting arose out of a rivalry between two Simi Valley gangs: the West Side Locos, of which Vasquez, Bravo, and Romero were members, and the Varrio Simi Valley, several of whose members lived at 355 Bonita Drive. *Id.* at 259-61. Police recovered a .22 caliber handgun that was fired in the January 13 shooting; however, several .25 caliber bullets were found in the car, and one .25 caliber bullet was found in Romero's pocket. *Id.* at 259-60.

Vasquez and Bravo told SVPD officers that Romero possessed a chrome .25 caliber semi-automatic handgun and

that he had attempted to fire that handgun at the Varrio Simi Valley members on January 13. Appellant's Excerpts of R. 260. Vasquez and Bravo also stated that Romero had hidden the handgun at the residence of another West Side Locos member immediately after the shooting. *Id.* Vasquez and Bravo's story was corroborated by Gabriel Reyes, a member of Varrio Simi Valley who had seen Romero with a chrome handgun. *Id.* at 261. This information was particularly significant, because a .25 caliber handgun had been used in the unsolved November 28, 1997 shooting of a Varrio Simi Valley member. See *id.* at 260.

Based upon this information, petitioners believed that Romero, who had been released, likely had recovered the .25 caliber handgun. See Appellant's Excerpts of R. 260-61. Petitioners also learned from Romero's family that Romero was living at 1363 Patricia Avenue in a "poor house" – a single-family home that housed a large number of unrelated individuals who rented space in rooms in the house, in the furnished garage, and in motorhomes and vans parked in the backyard. Pet. App. 56a-57a. Additionally, petitioners learned that at least one other member of the West Side Locos was either living or had lived in the same house. *Id.* at 56a-57a. Based on their experience, the officers concluded that 1363 Patricia Avenue may have been a safe house for the West Side Locos. See Appellant's Excerpts of R. 177.

Petitioners secured a search warrant for 1363 Patricia Avenue on January 29, 1998, which authorized them to search for, among other things, "'[d]eadly weapons'" and "'evidence of street gang membership or affiliation with any street gang.'" Pet. App. 57a (alteration in original). The warrant authorized a search both of the house and of the vehicles on or adjacent to the property. Appellant's Excerpts of R. 253. The search warrant was executed at 1363 Patricia Avenue at approximately 7:00 AM on the morning of February 3, 1998. Pet. App. 2a. Petitioners were the investigating officers responsible for overseeing the search.

Id. Because of the strong evidence that armed gang members may have been present at 1363 Patricia Avenue and because officers had encountered resistance during previous visits to the home, the officers decided to use a Special Weapons and Tactics (SWAT) team to clear the residence and secure any occupants before the search. See Appellant's Excerpts of R. 67-69, 77, 80. The SWAT team discovered four individuals on the premises; each was handcuffed and brought to a furnished garage for the duration of the search. Pet. App. 25a, 59a, 67a.

Respondent Iris Mena was asleep in her bed when a SWAT team officer broke down her padlocked door, pointed his weapon at her, handcuffed her and walked her into the garage. Pet. App. 3a, 25a. The garage had been furnished with several beds, where respondent sat with the other three occupants. *Id.* at 29a. Respondent was wearing sweatpants and a long-sleeved shirt when she was brought into the garage, but the officers brought her a jacket and shoes. *Id.* at 25a She was permitted to move around the garage, and in fact she moved from one bed to another while the search progressed. See Appellant's Excerpts of R. 160. Because the officers were uncertain of her connection to the West Side Locos and because they were concerned that she might interfere with the search, the officers did not remove her handcuffs. See *id.* at 93-94, 182. She never asked for her handcuffs to be loosened. *Id.* at 163.

Knowing that many of the West Side Locos' members were illegal immigrants, SVPD officers notified the Immigration and Naturalization Service (INS) before the search was initiated. Pet. App. 27a, 33a. While respondent and the other occupants were detained, an INS officer arrived at the garage and the occupants were asked about their immigration status. *Id.* at 7a, 25a, 59a. The officers learned that one of the detainees was an illegal alien, and they took him into custody. See Appellant's Excerpts of R. 132. Like the others, respondent, who has a Salvadorean accent, was asked whether

she was a legal alien. Pet. App. 7a, 25a. After she answered she was further asked for her immigration papers; she directed the officers to a purse in her room, in which they discovered her papers. *Id.* at 25a-26a.

The search lasted approximately two to three hours, Pet. App. 3a, 59a,[1] and the officers discovered and seized a .22 caliber handgun with ammunition, baseball bats with gang writing and other gang paraphernalia, and a quantity of marijuana. Appellant's Excerpts of R. 95-96. After the search was complete, respondent and the other occupants were released. Pet. App. 3a, 59a. Other than the initial handcuffing, respondent had no physical contact with the officers. Appellant's Excerpts of R. 161.

Respondent filed an action against petitioners under 42 U.S.C. § 1983, alleging that they violated her rights under the Fourth and Fourteenth Amendments by, *inter alia*, "arresting and detaining plaintiff Iris Mena for an unreasonable time and in an unreasonable manner and without probable cause or reasonable suspicion."[2] Appellant's Excerpts of R. 3. Petitioners and their co-defendants argued that they had qualified immunity for any alleged wrongs, and filed a motion for summary judgment on that ground. Pet App. 59a-60a. The district court denied that motion and the Ninth Circuit affirmed that denial. *Id.* at 59a-60a, 70a. At trial, a jury found petitioners liable for violating respondent's Fourth Amendment right against unreasonable seizures. *Id.* at 50a-

[1] The officers who performed the search testified that the search lasted no longer than two hours. Pet. App. 59a n.3; Appellant's Excerpts of R. 85, 96, 183.

[2] Respondent's initial complaint alleged multiple constitutional violations by the City of Simi Valley and eighteen police officers, and was filed along with co-plaintiff Jose Mena, respondent's father and the owner of the house on 1363 Patricia Avenue. Appellant's Excerpts of R. 1-8. As a result of the trial court's dismissal of some of the plaintiffs' claims and the jury's rejection of others, the only issues remaining are respondent's claims against the petitioners.

51a. Petitioners filed a motion to alter or amend judgment under Fed. R. Civ P. 59(e), which the trial court denied. *Id.* at 35a-36a.

2. The Ninth Circuit upheld the trial court's judgment on two independent grounds. First, the court concluded that the officers' detention of Mena violated the Fourth Amendment because it was objectively unreasonable to detain Mena at gun-point and to keep her in handcuffs during the course of the search. Pet. App. 8a-10a. The Ninth Circuit opined that, because Mena was not a "suspect," "the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals." *Id.* at 9a. The court held that, because Mena was not a suspect, the police should not have detained her at gun-point or "us[ed] handcuffs for an extended period," and instead "should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest." *Id.* (footnote omitted). The court further held that the officers were not entitled to qualified immunity because *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), and *Franklin* v. *Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994), clearly established the right to be free "from the type of search Mena allege[d]." Pet. App. 15a.

Second, the panel held that the officers had violated Mena's clearly established constitutional rights "by inquiring unnecessarily into her citizenship status." Pet. App. 10a. The panel reached this conclusion despite the fact that this basis for liability was neither briefed by the parties nor presented to the jury. See *id.* at 27a & n.3, 34a n.2. Nevertheless, the panel held that, because the officers did not have a reasonable particularized suspicion that Mena was not a citizen, they were forbidden to ask her any questions about it. *Id.* at 10a The panel found that the officers' questions were an unreasonable seizure under the Fourth Amendment; it did not consider the Fifth or Sixth Amendments in reaching its conclusion. See *id.* at 14a. The panel concluded that the

officers were not entitled to qualified immunity in light of *United States* v. *Brignoni-Ponce*'s requirement that officers have reasonable suspicion in order to stop individuals to investigate their immigration status. See 422 U.S. 873, 884 (1975); Pet. App. 14a.

3. Over the votes of seven dissenting judges, petitioners' suggestion for rehearing en banc was denied. Pet. App. 24a, 25a, 33a. The dissenting judges pointed out that the panel's conclusion that an officer's questions about citizenship created a Fourth Amendment violation was a proposition that directly conflicted with a decision of the Seventh Circuit and that "[n]o reasonable police officer would have imagined . . . was the law." *Id.* at 26a (Kleinfeld, J., dissenting), *id.* at 33a (Gould, J., dissenting). Furthermore, the dissenters argued that the panel's conclusion that the manner in which Mena was detained violated the Fourth Amendment eviscerated the rule, announced in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that "'a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.'" Pet. App. 30a (Kleinfeld, J., dissenting); see also *id.* at 33a (Gould, J., dissenting). The dissenters concluded that,

> [f]or their own safety and the safety of other occupants, reasonable police officers cannot be held to know that it violates the Constitution to detain for two or three hours a woman fully dressed except for bare feet during a lawful search of a house with many padlocked doors, known to house a member of a gang involved in a drive-by shooting.

Id. at 31a (Kleinfeld, J., dissenting); see also *id.* at 33a (Gould, J. dissenting).

REASONS FOR GRANTING THE PETITION

This case presents two fundamental constitutional questions that have divided the courts of appeals, are squarely posed by the decision below and are therefore now ripe for resolution by this Court. The first is whether the mere questioning of an individual who has been lawfully seized can constitute an additional, unreasonable seizure. The Ninth Circuit's conclusion that an officer's question to a constitutionally seized individual can constitute a second "seizure" requiring reasonable suspicion parallels the holdings of the Eighth, Tenth, and Eleventh Circuits. These decisions are in fundamental conflict with the conclusions of the Fourth, Fifth, and Seventh Circuits that mere questioning by the police of a lawfully detained individual cannot constitute a new "seizure."

1. This Court has reaffirmed repeatedly that "mere police questioning does not constitute a seizure." *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); *INS* v. *Delgado*, 466 U.S. 210, 216 (1984); *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *United States* v. *Mendenhall*, 446 U.S. 544, 553-54 (1980) (plurality opinion). In particular, this Court has recognized that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Delgado*, 466 U.S. at 216. Law enforcement officers may ask questions of individuals they approach in the street, on a bus, or at their work, "even when . . . [they] have no basis for suspecting a particular individual." *Bostick*, 501 U.S. at 434-35; *Delgado*, 466 U.S. at 218. Such questioning does not implicate the Fourth Amendment "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded." *Delgado*, 466 U.S. at 216.

Mendenhall, *Royer*, *Delgado*, and *Bostick* all dealt with police questions of individuals who were not detained or

otherwise "seized" when the officers initiated questioning. *Bostick*, 501 U.S. at 431-32; *Delgado*, 466 U.S. at 218; *Royer*, 460 U.S. at 493-95; *Mendenhall*, 446 U.S. at 548. This Court has yet to consider whether the Fourth Amendment can be violated by police questioning of individuals who have already been seized, whether such seizure was pursuant to an arrest, an investigative stop or, as in this case, a detention during the execution of a search warrant. The courts of appeal have split on this question. Some circuits have held that police questioning of a lawfully seized individual does not constitute a new seizure any more than police questioning of a citizen on the street. Other circuits have held, as the Ninth Circuit did in this case, that the Fourth Amendment prohibits officers from asking questions of lawfully seized individuals that they are free to ask of an individual on the street.

The Ninth Circuit's conclusion that petitioners needed reasonable suspicion before they could inquire about a lawfully detained individual's citizenship echoes the conclusions of three other circuits. The Eighth Circuit, the Tenth Circuit, and the Eleventh Circuit have all held that questions asked of a lawfully detained individual can constitute an additional, and unreasonable seizure under the Fourth Amendment unless the questions are based on reasonable suspicion. See *United States* v. *Holt*, 264 F.3d 1215, 1229 (10th Cir. 2001) (en banc) (per curiam) (holding that police questioning of a motorist during a traffic stop "on matters unrelated to the purpose of the initial stop" could be "so intrusive as to violate the Fourth Amendment"); *United States* v. *Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999) (holding that officer violated Fourth Amendment by asking "unrelated questions" of individual stopped for speeding); *United States* v. *Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) (holding that officer making traffic stop is limited to asking "questions reasonably related to the stop"). These courts have drawn a distinction between questions that are "related" to the

purpose of the lawful detention and questions that are "unrelated," and have held that officers need reasonable suspicion to expand the scope of questioning to "unrelated" areas. See *United States* v. *Murillo*, 255 F.3d 1169, 1175 (9th Cir. 2001), *cert. denied*, 535 U.S. 948 (2002); *Pruitt*, 174 F.3d at 1221; *United States* v. *Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *United States* v. *Barahona*, 990 F.2d 412, 416 (8th Cir. 1993) ("For a detention to be reasonable, an officer's questions must relate to the purpose of the stop. However, if the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions.") (citations omitted).

The Fourth, Fifth and Seventh Circuits, on the other hand, have rejected the claim that questions asked of a lawfully detained individual can constitute a Fourth Amendment violation. See *United States* v. *Chacon*, 330 F.3d 323, 328-29 (5th Cir. 2003); *Martinez-Camargo* v. *INS*, 282 F.3d 487, 493 (7th Cir. 2002); *United States* v. *Childs*, 277 F.3d 947, 949-50 (7th Cir.) (en banc), *cert. denied*, 537 U.S. 829 (2002); *United States* v. *Machuca-Barrera*, 261 F.3d 425, 432 & n.21 (5th Cir. 2001); *United States* v. *Jacobs*, 173 F.3d 426 (4th Cir. 1999) (table) (per curiam), *available at* 1999 WL 96121, at *2; *United States* v. *Crain*, 33 F.3d 480, 485 (5th Cir. 1994); *United States* v. *Shabazz*, 993 F.2d 431, 436-37 (5th Cir. 1993).

The Seventh Circuit analyzed the issue of police questioning of lawfully detained individuals in detail in its en banc decision in *Childs*. In that case, an officer stopped a driver for failing to wear a seat belt and asked him whether he was carrying any marijuana, even though the officer had no particularized reasonable suspicion of drug possession. The *Childs* court found that the question about drugs did not constitute a separate seizure, reasoning that "because questions are neither searches nor seizures, police need not demonstrate justification for each inquiry." 277 F.3d at 949.

The court found support for its conclusion in this Court's explicit treatment of police questioning of persons not in formal custody and implicit acceptance, for Fourth Amendment purposes, of police questioning of prisoners. See *id.* at 950-51 (citing *Bostick*, 501 U.S. at 434, and *Texas* v. *Cobb*, 532 U.S. 162 (2001)). From these decisions the *Childs* court drew the logical conclusion that "[t]o say that questions asked of free persons and questions asked of prisoners are not 'seizures' but that questions asked of suspects under arrest *are* seizures would have neither the text of the Constitution behind it nor any logical basis under it." *Id.* at 951.

The Fourth and Fifth Circuits have similarly "reject[ed] any notion that a police officer's questioning, even on a subject unrelated to the purpose of a lawful stop, is itself a Fourth Amendment violation," on the ground that "[m]ere questioning . . . is neither a search nor a seizure." *Shabazz*, 993 F.2d at 436; see *Chacon*, 330 F.3d at 328-29 (holding that unrelated questions about drugs asked during immigration inspection were not a seizure); *Machuca-Barrera*, 261 F.3d at 432 n.21 ("[D]etention, not questioning, implicates the Fourth Amendment"); *Jacobs*, 1999 WL 96121, at *2 ("[M]ere questioning by the police, even on a subject unrelated to the purpose of the stop, is not itself a Fourth Amendment violation."); *Crain*, 33 F.3d at 485 (holding that unrelated questioning during traffic stop was not a seizure).

The stark conflict between the decisions of the Fourth, Fifth, and Seventh Circuits and those of the Eighth, Ninth, Tenth, and Eleventh Circuits on whether the questioning of a lawfully detained individual can violate the Fourth Amendment is an issue of national importance to law enforcement that is ripe for resolution by this Court. This issue arises often and in a variety of contexts: from traffic stops, see *Childs*, 277 F.3d at 949-51, to immigration inspections, see *Chacon*, 330 F.3d at 328-29, to detentions during the execution of search warrants. See Pet. App. 10a-14a. The uncertainty in the Fourth Amendment's application

to these various contexts has a negative effect on officers' performance of their duties to investigate crime.

The Ninth Circuit's determination that officers can be held liable in damages for asking a question of a lawfully detained individual has a particularly chilling effect. The boundary between questions that are permissibly "related" to the basis for a valid detention and those that are unconstitutionally "unrelated" will often be unclear. Indeed, in this very case, the officers were authorized to search for "'evidence of street gang membership'"; they knew that members of the gang who might reside at the premises were primarily illegal immigrants; they found respondent at those premises; and they were unsure of her connection to the gang. Pet. App. 57a, 27a, 33a; Appellants' Excerpts of R. 93-94. In these circumstances, it is far from obvious that respondent's immigration status was completely unrelated to her detention. In all events, officers forced to make difficult judgment calls in the field should not face liability if a jury disagrees months or years later with such on-the-spot decisions.[3] Moreover, the "relationship" test that the Eighth, Ninth, Tenth, and Eleventh Circuits Circuits employ will inevitably spawn much protracted litigation. For these reasons this Court should resolve this uncertainty by granting the petition for certiorari.

2. The Ninth Circuit's particular holding in the present case that questions regarding immigration status may not be posed to a lawfully detained individual without reasonable suspicion directly conflicts with the Seventh Circuit's decision in *Martinez-Camargo*. The Ninth Circuit held that "the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status. . . . [when] there was

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[3] Indeed, given the on-the-spot nature of the inquiry, and the fact that several other circuits have concluded that such inquiries do not implicate the Fourth Amendment at all, the Ninth Circuit's determination that the officers should have known their questioning was unconstitutional, and thus are not entitled to qualified immunity, is plainly erroneous.

no reason evident in the record to be suspicious of her citizenship status." Pet. App. 10a. The Ninth Circuit supported this conclusion with a dramatically expansive reading of this Court's decision in *Brignoni-Ponce*, 422 U.S. at 878-84. In *Brignoni-Ponce*, this Court held that Border Patrol officers must have reasonable suspicion that individuals may be illegal aliens in order to *stop* individuals for questioning. See *id.* at 884. The Ninth Circuit, however, cited *Brignoni-Ponce* for the proposition that an officer must have reasonable suspicion that an individual is not a citizen in order "to *interrogate* that individual regarding his citizenship," and applied this proposition to find a Fourth Amendment violation predicated on questions alone. Pet. App. 10a (emphasis added).

In *Martinez-Camargo*, the Seventh Circuit rejected a claim that an officer's questions regarding alienage, which were asked during a valid Terry stop, violated the Fourth Amendment. See 282 F.3d at 493. The Seventh Circuit found that the officers' questions were "neither searches nor seizures," and concluded that the questions asked during the stop "did not constitute a seizure independent and distinct from the original investigatory stop." *Id.* The direct conflict between the Ninth Circuit and Seventh Circuit as to the permissibility of officers' asking detained individuals about their immigration status compellingly supports a grant of certiorari in this case.

3. The alternative ground for the Ninth Circuit's decision presents a similarly significant constitutional issue. The court below gave a particularly expansive interpretation of the "unusual case" exception of *Michigan* v. *Summers* – an interpretation that conflicts both with the intent of *Summers* and with the decisions of other federal courts of appeal.

In *Michigan* v. *Summers*, this Court held that the Fourth Amendment permits officers executing a search warrant to detain occupants of a residence during the course of the search. See 452 U.S. at 704-05. The Court held that the

detention of an occupant during a search could be justified by several law enforcement interests, including "preventing flight in the event that incriminating evidence is found," "minimizing the risk of harm to the officers," and facilitating "the orderly completion of the search." *Id.* at 702-03. The Court recognized that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* The court also noted that the very existence of a search warrant "provides an objective justification for the detention," for the search warrant shows that a neutral magistrate has found "probable cause to believe that someone in the home is committing a crime." *Id.* at 703. In light of this probable cause determination, police have "an easily identifiable and certain basis" for concluding that detention of a home's occupant is necessary – "[t]he connection of . . . [the] occupant to that home." *Id.* at 703-04.

Summers thus held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises *while* a proper search is conducted." *Id.* at 705 (emphasis added; internal footnotes omitted). The Court noted that, "[a]lthough special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case," it held that a "routine detention of residents of a house while it [is] being searched for contraband pursuant to a valid warrant is not such a case." *Id.* at 705 n.21. The "unusual case" posited by *Summers* therefore requires something more than a mere "routine detention." Indeed, with the exception of the Ninth Circuit's decision in this case, every other court of appeals to consider the question has found "unusual cases" only in truly egregious circumstances that were far removed from the circumstances in this case. The Ninth Circuit has therefore staked out a position that is irreconcilable with the language of *Summers* and the decisions of other courts of appeals.

The Ninth Circuit's decision that respondent's detention was unreasonable rests upon a broad reading of the "unusual case" exception. In almost every aspect, petitioners conducted a routine search with a routine detention of the occupants. They were investigating "a gang-related drive-by shooting – clearly a serious crime," Pet. App. 8a – in a residence they reasonably thought was a gang safe house. While respondent was "not the subject of this investigation," *id.*, the officers had no idea who she was or what her relationship to the gang might be when they encountered her padlocked door. Breaking that door down and pointing a weapon at respondent when the officers first encountered her was hardly unusual or egregious conduct under the circumstances. To the contrary, it was plainly designed to "prevent[] flight," "minimiz[e] the risk of harm to the officers," and to convey the necessary "unquestioned command of the situation." *Summers*, 452 U.S. at 702-03.

Nor was it unusual to detain respondent in handcuffs in a furnished room for two to three hours while the police recovered a variety of weapons, drugs and gang paraphernalia from the premises. The search itself required this amount of time because the officers needed to search both the house and the several vans and motorhomes on the property. See Pet. App. 57a Moreover, the officers were searching for weaponry that they reasonably thought had been used by members of a violent street gang in a drive-by shooting – facts that would lead the officers to conduct the search more cautiously and thus more slowly. See *id.* During the time the search was conducted, Mena was free to move about the furnished room, she was given a jacket and shoes, and she did not complain that the handcuffs were too tight.

Other courts of appeal have squarely contradicted the Ninth Circuit's conclusion that a detention of this nature constitutes an "unusual case." See *Pikel* v. *Garrett*, 55 Fed. Appx. 29, 32 (3d Cir. 2002); *United States* v. *Fountain*, 2 F.3d 656, 661-63 (6th Cir. 1993). In *Pikel*, the Third Circuit held that law

enforcement officers who handcuffed employees during a three and one half hour search of a business were entitled to qualified immunity. 55 Fed. Appx. at 32. In *Fountain*, the Sixth Circuit held that handcuffing and forcing occupants to lie face down was not an "unusual case" under *Summers* in light of legitimate law enforcement interests in preventing flight and minimizing risk of harm. 2 F.3d at 663.[4]

Other courts of appeal have only found the "unusual case" in extreme circumstances that involve something more than detaining someone initially at gun-point then handcuffing them for two to three hours. See *Williams* v. *Kaufman County*, 352 F.3d 994, 1011 (5th Cir. 2003) (holding that three-hour detention during which plaintiffs were strip-searched was unreasonable); *Levito* v. *Lapina*, 258 F.3d 156, 172-73 (3d Cir. 2001) (holding that eight-hour detention of plaintiff during search was unreasonable). *Jacobs* v. *City of Chicago*, 215 F.3d 758, 772 (7th Cir. 2000) (holding that detention violated Fourth Amendment where search was illegal and officers should have discovered mistake before detaining plaintiff for three hours); *Heitschmidt* v. *City of Houston*, 161 F.3d 834, 836 (5th Cir. 1998) (holding that detention of plaintiff in painfully tight handcuffs for over four hours violated Fourth Amendment); *Pecsi* v. *Doyle*, 940 F.2d 661 (6th Cir. 1991) (table) (per curiam), *available at* 1991 WL 137597 (holding that detention violated Fourth Amendment where officers held plaintiff for five to six hours total and at gunpoint for two to three hours); see also *Franklin*, 31 F.3d at 876-77 (holding that officers' detention of man who had advanced multiple sclerosis and who was

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[4] *See also Mitchell* v. *Unified Gov't*, No. Civ. A. 00-2116-CM, 2000 WL 1920036, at *9 (D. Kan. Dec. 21, 2000) (finding that officers had qualified immunity for two and one half hour handcuffed detention); *Crosby* v. *Hare*, 932 F. Supp. 490, 492 (W.D.N.Y. 1996) (holding that officers acted reasonably when they detained subjects for two hours during search, during 90 minutes of which subjects were in handcuffs).

partially nude in handcuffs for over two hours violated Fourth Amendment).

Indeed, the utter irreconcilability of the Ninth Circuit's decision in the present case with the decisions of other circuits was confirmed by the Ninth Circuit itself in *Meredith* v. *Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003). In *Meredith* the Ninth Circuit confronted another claim of an unreasonable detention in handcuffs during execution of a search warrant. See *id.* at 1063. While the Ninth Circuit concluded that the officer's use of handcuffs without justifiable circumstances violated the Fourth Amendment, the court nevertheless held that the officers had qualified immunity. See *id.* It reasoned that "[a]t the time of the search, July 10, 1998, it was not clearly established in this *(or any other) circuit* that simply handcuffing a person and detaining her in handcuffs during a search for evidence would violate her Fourth Amendment rights." *Id.* (emphasis added). This recognition that no other circuit had concluded that handcuffing could render a detention incident to a valid search unreasonable confirms that the Ninth Circuit's decision in this case conflicts with the decisions of other courts.[5]

That conflict is highlighted by the fact that the court found that petitioners were not entitled to qualified immunity, and thus that it was "clearly established" that detaining an occupant at gun-point and handcuffing her for the two to three hours required to search the premises satisfied *Summers*' "unusual case" exception. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

[5] Obviously, in the ordinary case, it is not the province of this Court to resolve intra-circuit conflicts, but here seven judges of the en banc court would have set aside the judgment. Thus, apart from the circuit conflict, the issue presented here will be decided differently by different panels of the Ninth Circuit. That kind of arbitrary outcome merely reinforces the need for review by this Court.

Saucier v. *Katz*, 533 U.S. 194, 202 (2001). The Ninth Circuit's conclusion that the unlawfulness of handcuffing during a *Summers* detention was "apparent" only highlights the deep conflict between its interpretation of the "unusual case" exception and that of other circuits. See *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002). Indeed, even when courts from other circuits have found "unusual cases," it is only in the most egregious of cases that the courts have found that the officers were not entitled to qualified immunity for their actions. See *Williams*, 352 F.3d at 1011 (holding that although three-hour detention during which plaintiffs were strip-searched was unreasonable, officer was entitled to qualified immunity); *Levito*, 258 F.3d at 172-73 (holding that although eight-hour detention of plaintiff during search was unreasonable, agents were entitled to qualified immunity because it was not clear that *Summers* barred such a detention).

In sum, the Ninth Circuit has placed substantial obstacles in the way of reasonable law enforcement efforts. Mere questioning regarding a lawfully detained individual's immigration status is now a Fourth Amendment violation, and effective detention during the entire duration of a lawful and reasonable search is a clear violation of the Constitution. These holdings are plainly harmful to efforts to keep the peace and place officers in harm's way. This is intolerable and the Court should intervene now to decide these fundamental issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 13, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 01-56673

IRIS MENA,
Plaintiff-Appellee,
and
JOSE E. MENA,
Plaintiff,
v.

CITY OF SIMI VALLEY; RANDY G. ADAMS; MARVIN HODGES; ROY JONES; VINCENT ALLEGRA; ALAN MCCORD; RICHARD THOMAS; RONALD CHAMBERS; WILLIAM LAPPIN; ARNOLD BAYNARD; JEFFREY DOMINICK; JACK GREENBURG; RICHARD LAMB; FRANK AHLVERS; JOHN ADAMCZYK; TIM BROWN,
Defendants,
and
DARIN L. MUEHLER; ROBERT BRILL,
Defendants-Appellants.

Argued and Submitted Feb. 4, 2003
Filed June 23, 2003

Appeal from the United States District Court for the Central District of California; A. Howard Matz, District Judge, Presiding. D.C. No. CV-98-08512-AHM.

Before PREGERSON and REINHARDT, Circuit Judges, and ARCHER,[1] Senior Circuit Judge.

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[1] The Honorable Glenn L. Archer, Jr., Senior Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

OPINION

PREGERSON, Circuit Judge.

Iris Mena brought this action in the district court under 42 U.S.C. § 1983, alleging that Robert Brill and Darin L. Muehler, both City of Simi Valley police officers, used excessive force and restrained her for an unreasonable period of time during a search of her home. The officers appeal the district court's judgment entered on a jury verdict. They argue that the district court erred in ruling that they are not entitled to qualified immunity. Additionally, the officers contend that they are entitled to a new trial on the unlawful detention claim because the district court abused its discretion (1) in denying the officers' proposed instruction on unlawful detention; (2) through its conduct during voir dire; and (3) through its cross-examination of defense witnesses during trial. The officers also argue that the award of punitive damages to Mena should be vacated as unsupported by substantial evidence. We have jurisdiction to hear this appeal under 28 U.S.C. § 1291, and we affirm.

Facts and Procedural Background

Just before 7:00 a.m. on February 3, 1998, several officers from the Simi Valley Police Department (SVPD) SWAT team executed a valid search warrant at 1363 Patricia Avenue. Brill and Muehler were directly responsible for supervising the search. The police officers searched the residence as part of their investigation of a gang-related drive-by shooting. The officers believed that Raymond Romero, the officers' primary suspect, was residing in the house, a single-family dwelling housing many unrelated residents. Iris Mena was a resident in the house, which was owned by her father, Jose Mena. The police officers forcibly entered the residence and observed that some of the rooms were locked, many with padlocks on the outsides of the doors. The officers proceeded to force entry into these locked

rooms, including the bedroom in which Mena was sleeping. The officers, wearing SWAT team paraphernalia, found Mena in bed, and, pointing a submachine gun at her head, turned her over onto her stomach and handcuffed her. After searching her person and her room, the officers led Mena—barefoot and still wearing her pajamas—outside through the rain to a cold garage. Although she was absolutely compliant, the officers detained Mena in handcuffs for approximately two to three hours. While the police officers held Mena in the garage, the officers did not explain to her the reason she was being detained. During her detention, an immigration officer who had joined the police on the search asked Mena questions concerning her citizenship status. Upon learning from Mena that her citizenship documentation was in her purse, a police officer searched her purse without her consent. The police officers did not release Mena from the handcuffs until after they completed the search of the premises, at which time they finally informed her why she had been detained.

On October 19, 1998, Mena brought an action under 42 U.S.C. § 1983, alleging that the police officers violated her civil rights in connection with the February 3, 1998, search of her home. Specifically, she contended that (1) the search warrant and search were overbroad; (2) the officers detained Mena unlawfully; (3) the officers detained her in an unreasonable manner; and (4) the officers failed to comply with the "knock and announce" rule before entering the house. The defendants moved for summary judgment on the ground that Mena's constitutional rights were not violated, or, alternatively, that the officers were entitled to qualified immunity. On August 10, 1999, the district court issued an order denying summary judgment, holding that because "a reasonable trier of fact could conclude that the warrant and/or its execution was 'overbroad'" and "a reasonable trier of fact could conclude that Iris Mena's detention was unreasonable," defendants were not entitled to qualified immunity as a matter

of law. The officers appealed, and we affirmed, except as to the claim that the warrant was overbroad on its face. *See Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir.2000) (*Mena I*). On that claim, we reversed and remanded for the entry of summary judgment in favor of the appellants. *Id.* at 1037-38.

On June 12, 2001, trial began on Mena's Fourth Amendment claims. On June 21, 2001, the trial concluded and the jury returned a verdict finding that Muehler and Brill violated Mena's Fourth Amendment right to be free from unreasonable seizure by detaining her with unreasonably excessive force and for a longer period than was reasonable. The jury found Muehler and Brill each liable to Mena in the amount of $10,000 in compensatory damages and $20,000 in punitive damages. On July 11, 2001, the district court entered judgment against Muehler and Brill.

During trial, the Supreme Court decided *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), in which the Court clarified the proper approach to evaluating claims of qualified immunity. On July 25, 2001, the defendants filed a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e) based on a purported intervening change in qualified immunity law; for a new trial under Fed.R.Civ.P. 59(a) on the ground that the district court's jury instruction on unlawful detention was legally erroneous; and for judgment as a matter of law under Fed.R.Civ.P. 50(b) based on an asserted lack of evidence to substantiate the jury's punitive damages award. The district court denied that motion, and the officers now appeal.

Discussion

I. Qualified Immunity

Muehler and Brill argue that they should be shielded from liability to Mena under the doctrine of qualified immunity.[2] "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Saucier*, 533 U.S. at 200, 121 S.Ct. 2151; *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The central interest that underlies the doctrine of qualified immunity is that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). Although this court has already affirmed the district court's pre-trial determination that the officers were not entitled to qualified immunity with respect to the claim of unlawful detention, *inter alia, Mena I*, 226 F.3d at 1039-41, the officers argue that *Saucier* effected an intervening change in the law sufficient to amend our earlier decision and dismiss the excessive force claims based on qualified immunity.

Under *Saucier,* the first step in determining whether an official is entitled to qualified immunity is to consider whether the facts alleged, viewed in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Saucier*, 533 U.S. at 200-01, 121 S.Ct. 2151; *accord Robinson v. Solano County*, 278 F.3d 1007, 1012 (9th Cir.2002) (en banc). Assuming a constitutional violation could be established on a favorable view of the plaintiff's submissions, "the next, sequential step

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[2] We review de novo a district court's decision regarding qualified immunity. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994); *Robinson v. Prunty*, 249 F.3d 862, 865-66 (9th Cir.2001).

is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151. But "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Because law as to what is considered reasonable develops over time, courts must determine whether the law was clearly established at the time of the alleged constitutional violation. *Robinson*, 278 F.3d at 1013 (noting that "the law at that time must be our guide").

A. Whether Mena Asserts a Violation of a Constitutional Right

To evaluate the officers' claim that they are entitled to qualified immunity, we first accept the facts as Mena alleges them and determine whether those facts point to a constitutional violation. According to Mena, at least eighteen members of the Simi Valley Police Department (SVPD) SWAT team forcibly gained entry into her home just after dawn on February 3, 1998. Awakened abruptly by a loud noise, Mena opened her eyes to find "a person dressed in black pointing a gun with a light on top" at her face. Mena, especially startled in her sleepy haze, assumed that the individual wearing dark clothes and a balaclava[3] and pointing an MP-5 submachine gun at her head had come in "to rob and

[3] A sophisticated type of ski mask, a balaclava conceals the features of the face during a SWAT raid. The SWAT officers also wore helmets and goggles.

kill" her. Mena emphasizes that throughout this initial encounter no person identified himself as a police officer. Not until an officer pushed Mena onto her bed, face down, and placed handcuffs on her was she able to *infer* that these were police officers, because she assumed that police officers are "the only persons that put handcuffs on people." The officers searched Mena and her room, yanked her up from her bed by her shirt, and led her out of her room in her pajamas. Although it was raining outside and Mena was barefoot, the officers directed her outside and into a cold garage, where she was detained for two to three hours.

During her detention, an officer questioned Mena about her citizenship status. Following that, an INS agent who accompanied the SVPD on the search asked her more specific questions about her immigration status. Although Mena was a legal resident of this country at the time, the INS agent asked her where her immigration documentation was, and upon learning that the papers were in her purse, a police officer proceeded to search it without her consent. The police officer then turned the papers over to the INS agent, who subsequently inspected them.

On these facts, there is no doubt that Mena has alleged a violation of her constitutional rights under the Fourth Amendment. The Fourth Amendment protects citizens from unreasonable government seizures. U.S. Const. amends. IV, XIV; *Camara v. Municipal Ct.*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). To succeed on a claim of unreasonable search or seizure under the Fourth Amendment, a plaintiff must show (1) the existence of a search or seizure and (2) that the search or seizure was unreasonable or conducted in an unreasonable manner. U.S. Const. amend IV. There is no dispute that Mena's detention was a seizure. We therefore must consider—based on the evidence most favorable to Mena—whether her detention was reasonable.

To evaluate claims of unreasonable seizures and detentions in the course of an arrest, investigatory stop, and other seizures of an individual, we apply the "objective reasonableness" standard the Supreme Court adopted in *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In addition to weighing factors "including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight," *id.* at 396, 109 S.Ct. 1865, a court must consider whether a detention during a search "is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy." *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir.1994).[4] In evaluating whether an officer's conduct is reasonable, we pay "careful attention to the facts and circumstances of each particular case," *Graham*, 490 U.S. at 398, 109 S.Ct. 1865, and analyze the facts and circumstances of the search or seizure "in their totality," *Franklin*, 31 F.3d at 876.

In this case, the officers were investigating a gang-related drive-by shooting—clearly a serious crime. They were authorized under a warrant to search the Mena home and seize property in relation to their investigation of Raymond Romero, the officers' primary suspect. Mena, however, was not the subject of this investigation.[5] Moreover, it was clear

[4] Although the standard under which individuals may assert qualified immunity also bears a reasonableness component, the Supreme Court in *Saucier* directs us to consider excessive force claims and assertions of qualified immunity separately. *Saucier*, 533 U.S. at 204-06, 121 S.Ct. 2151.

[5] In *Franklin*, we distinguished between (1) persons who are arrested, who "are ordinarily suspected of having committed serious, often violent, offenses," and (2) persons who are incidentally detained during a search of a residence, who "may simply be visiting a home or business for an innocuous if not benevolent purpose." 31 F.3d at 876. Although Mena was a resident of the house and not a visitor, she plainly falls into the latter category.

that Mena posed no "immediate threat to the safety of the officers or others." *See Graham*, 490 U.S. at 398, 109 S.Ct. 1865. Nor did she actively resist arrest or attempt to flee. *See id.* Mena had been asleep in her pajamas when the police entered her room. She was unarmed, docile, and cooperative in every respect.

Yet, although searches of Mena's person and room produced no evidence of gang membership or contraband and eighteen well-armed SWAT team officers secured the house in a matter of minutes, the officers handcuffed Mena and kept her in handcuffs for two to three hours. By any standard of reasonableness, in light of the fact that Mena was not a suspect in the crime, the officers should have released her from the handcuffs when it became clear that she posed no immediate threat[6] and did not resist arrest—much less resist arrest "actively."[7] Moreover, because Mena was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals—such as physical roughness, threatening deadly force, and using handcuffs for an extended period. Although we recognize that police officers are expected "to make split-second judgments"[8] in "difficult and tense"[9] situations, it strains reason to justify the necessity—in these factual circumstances—of pointing a machine gun at Mena's face, roughly

[6] Indeed, both a SWAT commander and one of the defense's expert witnesses testified that non-suspect detainees who pose no threat to police officers or others should be released from handcuffs.

[7] *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (directing courts to consider, *inter alia*, whether a suspect "actively resist[s] arrest"); *see also Franklin*, 31 F.3d at 877 (finding that continuing to hold a detainee in handcuffs after a residence has been secured when there were sufficient officers present to maintain security was unreasonable).

[8] *See Graham*, 490 U.S. at 396-97, 109 S.Ct. 1865.

[9] *See Liston v. County of Riverside*, 120 F.3d 965, 977 (9th Cir.1997).

jerking her off of her bed, marching her barefoot through the rain into a cold garage, and keeping her in handcuffs for several hours. We thus have no trouble in concluding that her detention was objectively unreasonable and "unnecessarily . . . degrading [and] prolonged." *Franklin*, 31 F.3d at 876.[10] Thus, Mena has asserted a violation of a constitutional right.

Furthermore, we note with particular emphasis that the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status. The officers did so presumably because of Mena's apparent Hispanic/Latino ethnicity, because there was no reason evident in the record to be suspicious of her citizenship status. On these facts alone, we observe that Mena has alleged a violation of a constitutional right.

We recognize that Congress has conferred INS agents limited authority to interrogate those who are or are believed to be undocumented immigrants.[11] But this power may not exceed the restraints on governmental intrusion the Fourth Amendment guarantees. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878-84, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Zepeda v. INS*, 753 F.2d 719, 726-27 (9th Cir.1983). Thus, an INS agent must have a *particularized reasonable suspicion* that an individual is not a citizen to interrogate that individual regarding his citizenship. *Brignoni-Ponce,* 422 U.S. at 884, 95 S.Ct. 2574 (holding that the Fourth Amendment "forbids

[10] The officers attempt to distinguish Franklin from the facts of this case by emphasizing that Curry (the plaintiff in *Franklin*) was sickly and Mena was not. But we clearly stated in *Franklin* that an individual's frail health raised "additional concerns" in the overall reasonableness analysis. *See Franklin,* 31 F.3d at 876 (listing "additional" concerns—such as detentions of the elderly, children, or individuals "suffering from a serious illness or disability"—beyond whether a search "is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy").

[11] 8 U.S.C. § 1357(a)(1).

stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens").

In *Brignoni-Ponce,* the Supreme Court affirmed a judgment of this court, and held that the U.S. Border Patrol policy of allowing its agents to stop vehicles in the border area without any reason to suspect illegal activity was unreasonable under the Fourth Amendment. *Id.* In that case, two Border Patrol officers stopped Brignoni Ponce's vehicle and questioned him and his two passengers. The Supreme Court noted that "the officers relied on a single factor to justify stopping [Brignoni-Ponce's] car: the apparent Mexican ancestry of the occupants." *Id.* at 885-86, 95 S.Ct. 2574. The Court held that Hispanic/Latino appearance alone "would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country." Thus, while the Court observed that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor," it held that Mexican appearance alone cannot justify stopping drivers who appear to be of Mexican descent to inquire about their citizenship status. *Id.* at 887-88, 95 S.Ct. 2574.

In *United States v. Montero-Camargo,*[12] we observed that "in suggesting that ethnic appearance could be relevant" to an immigration agent's decision whether to detain and question an individual regarding citizenship status, "the [*Brignoni-Ponce*] Court relied heavily on now-outdated demographic information." 208 F.3d at 1132-35. Because demographics had shifted dramatically in the twenty-five years between the *Brignoni-Ponce* decision and our decision in *Montero-Camargo*, we noted—citing revised data from the U.S.

[12] 208 F.3d 1122 (9th Cir.2000) (en banc), *cert. denied sub nom., Sanchez-Guillen v. United States*, 531 U.S. 889, 121 S.Ct. 211, 148 L.Ed.2d 148 (2000).

Census Bureau—that the "statistical premises" on which the Supreme Court based its dictum suggesting that ethnic appearance may be a relevant factor "are no longer applicable. The Hispanic population of this nation, and of the Southwest and Far West in particular, has grown enormously—at least five-fold in the four states referred to in the Supreme Court's decision."[13] *Id.* at 1133. To reconcile the shift in the ethnic makeup of the nation's population with the Fourth Amendment's requirement of individualized reasonable suspicion, we concluded that "[r]easonable suspicion requires particularized suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination." *Id.* at 1134-35 (footnotes omitted and emphasis in original).[14] Thus, we held that immigration officials may not use Hispanic/Latino appearance as a factor in determining whether a particularized reasonable suspicion exists to justify stopping and questioning an individual regarding his citizenship.

[13] The *Brignoni-Ponce* Court cited information from the 1970 Census and INS alien registration statistics for the States of California, New Mexico, Texas, and Arizona. *See Brignoni Ponce*, 422 U.S. at 886 n. 12, 95 S.Ct. 2574.

[14] *See also Montero-Camargo*, 208 F.3d. at 1134 n. 21 & n. 22 (noting that the holding in that case did not "preclude the use of racial or ethnic appearance as *one* factor relevant to reasonable suspicion or probable cause when a particular suspect has been identified as having a specific racial or ethnic appearance [but such an individual] may not be stopped and questioned because of appearance, unless there are other individualized or particularized factors which, together with the racial or ethnic appearance identified, rise to the level of reasonable suspicion or probable cause").

In this case, both the police officer[15] and the INS agent questioned Mena about her immigration status, presumably based on nothing more than her name or ethnic appearance.

[15] Aside from the conspicuous lack of a particularized reasonable suspicion, it is doubtful that the police officer had any authority to question Mena regarding her citizenship. Agents of the INS have limited authority to question and detain an individual suspected of being an illegal alien, so long as they have a particularized reasonable suspicion that the individual is in fact an illegal alien. 8 U.S.C. § 1357(a). But the basis for a local police officer to assert such authority is questionable.

Under 8 U.S.C. § 1357(g), the INS may enter into an agreement with a local law enforcement agency under which local law enforcement officers are granted limited authority to investigate, apprehend, or detain undocumented immigrants. Such agreements are subject to many requirements. *See* 8 U.S.C. § 1357(g)(1-10). It is not clear from the record whether the Simi Valley Police Department has entered into such an arrangement. If they have not, the officer who questioned Mena regarding her citizenship improperly assumed such authority. Because the record does not account for the lack or existence of an agreement under 8 U.S.C. § 1357(g) and in any event, as we will explain, the officer violated Mena's Fourth Amendment rights by questioning her citizenship status, we do not express a judgment as to whether the officer was properly vested with the authority to question and detain individuals properly suspected of being undocumented immigrants.

Another law affords local law enforcement officials limited authority to detain and question individuals regarding their immigration status. Subject to the Fourth Amendment, under 8 U.S.C. § 1252c(a), a state or local law enforcement official may arrest and detain an individual if (1) he is illegally present in the United States; (2) he has previously been convicted of a felony in the United States and since left the country or was deported; (3) the state or local law enforcement official obtains "appropriate confirmation" from the INS of the immigration status of the individual; and (4) the state or local law enforcement official only detains the individual for as long as is reasonably required for the INS to assume federal custody of the individual for the purposes of deportation or removal. *See* 8 U.S.C. § 1252c(a); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir.1999). But the police officer who questioned Mena and searched her purse without her consent had no notion about her citizenship status confirmed by the INS, nor did he have any knowledge whether Mena had previously been convicted of a felony and deported. In fact, Mena had no criminal record, nor had she been deported. Accordingly, the police officer could not have asserted the limited authority under § 1252c(a).

Although the officers did not confront Mena in the context of a traffic stop, as the officers did in *Brignoni-Ponce,* the facts of this case sit within the ambit of the Supreme Court's decision in that case. The officers simply did not have the particularized reasonable suspicion the Fourth Amendment requires to justify (1) questioning Mena regarding her citizenship status or (2) searching her purse for immigration documentation without her consent. Therefore, just on these facts alone, we note that Mena alleges a Fourth Amendment violation. In light of the circumstances surrounding her detention generally, the officers' questions and the search of her purse certainly constituted an "undue invasion of privacy." *See Franklin,* 31 F.3d at 876.

Evaluating the facts most favorable to Mena "in their totality,"[16] we conclude that the manner in which she was seized and detained was objectively unreasonable. Thus, Mena's allegations point to a violation of her rights under the Fourth Amendment. Because Mena successfully alleges the violation of a constitutional right, we now proceed to the next step in the qualified immunity inquiry.

B. Whether Mena's Right to be Free From the Type of Seizure She Alleges Was Clearly Established[17]

The Supreme Court in *Saucier* directed that if a constitutional violation could be proved by accepting the facts stated by the party asserting the injury, "the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151. Therefore, we must determine whether the right to be free from the type of seizure and detention Mena alleges was clearly established.

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[16] *Franklin*, 31 F.3d at 876.

[17] Whether federal rights asserted by a plaintiff were clearly established at the time of the alleged violation is a question of law reviewed de novo. *See Mabe v. San Bernardino County, Dep't of Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir.2001).

In doing so, a court must look to "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

For reasons stated above, we hold that the right to be free from the type of search Mena alleges was clearly established at the time of the search. The analysis used to determine whether a plaintiff alleges a violation of a constitutional right is instructive in determining whether that right was clearly established.[18] We again emphasize that "to find that the law was clearly established . . . we need not find a prior case with identical, or even 'materially similar,' facts. Our task is to determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-37 (9th Cir.2003) (quoting *Hope*, 536 U.S. at 741, 122 S.Ct. 2508) (citations omitted). Both *Graham* and *Franklin* had been decided by February 3, 1998, so the officers were on notice of their holdings. Although we had not yet decided *Montero-Camargo, Brignoni-Ponce's* requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status had long been the law. The law with respect to unreasonable seizures and detentions was thus sufficiently developed that any reasonable officer in 1998 would have known that the conduct Mena suffered was unlawful.

II. Judicial Interference

A. The Officers' Jury Instruction Argument

The officers argue that they are entitled to a new trial on the claim of unlawful detention because the district court

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[18] *See Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151 ("In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles [that] will become the basis for a holding that a right is clearly established."); *accord Robinson*, 278 F.3d at 1012-13 (quoting same from *Saucier*).

abused its discretion by rejecting the officers' proposed jury instruction on that claim. The officers contend that the instructions the district court formulated failed to recite the relevant law and were prejudicial to the officers. In particular, the officers contend that the instructions were flawed in the following ways: (1) the instructions did not establish that the law allows police limited authority to detain occupants of the premises while the police conduct a proper search; (2) the instructions did not indicate that officers may legally take certain actions to minimize the risk of harm associated with a lawful search; (3) the instructions did not emphasize that detention of residents during a lawful search should generally be considered reasonable under the Fourth Amendment, and that only in "special circumstances" should detention be considered unreasonable; (4) the instructions unfairly emphasized factors in the reasonableness analysis that favored the plaintiff-appellee; and (5) the district court improperly put a "time limit" on how long an officer may lawfully detain an occupant of the premises being searched.

A court must formulate jury instructions so that they fairly and sufficiently address the issues a case presents, accurately state the law, and are not misleading. *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir.2000). When a party alleges error in the formulation of the instructions, we consider the instructions as a whole and apply an abuse-of-discretion standard to determine whether they are misleading or inadequate. *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir.2001). Moreover, an error in instructing the jury in a civil case does not require reversal if it is harmless. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 805 (9th Cir. 2001), *cert. denied*, 535 U.S. 1018, 122 S.Ct. 1609, 152 L.Ed.2d 623 (2002).

Without even considering the deferential standard we apply to a district court's formulation of jury instructions, we

conclude that the appellants' arguments plainly lack merit. With respect to unlawful detention, the district court instructed as follows:

> Generally, a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable. In determining the reasonableness of a detention conducted in connection with a search, you may look to all the circumstances, including the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee. A detention may be unreasonable if it [is] unnecessarily painful, degrading, prolonged or if it involves an undue invasion of privacy. A police officer is required to release an individual detained in [connection] with a lawful search as soon as the officers' right to conduct the search ends or the search itself is concluded, whichever is sooner.

The very first sentence of the relevant instructions negates the appellants' first contention; the instructions plainly *do* inform the jury that "a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable." The second purported flaw the appellants cite is the failure to instruct the jury that police officers may take actions to minimize the risk of harm during a lawful search. However, the district court in instructing the jury clearly pointed out that the reasonableness of a detention is directly related to the threat that the suspect poses to "the security of the police . . . or to the ability of the police to conduct the search." The third purported flaw appellants proffer is that the district court's instructions did not indicate "that deten-

tions of residents during the execution of a valid search warrant should generally be considered reasonable under the Fourth Amendment." The first sentence of the relevant instructions correctly characterizes the law: "Generally, a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable." Moreover, the district court did not unfairly emphasize factors in the reasonableness analysis that favored the plaintiff-appellee—the officers' fifth argument. The district court correctly invoked factors in the reasonableness analysis as articulated in *Graham,* 490 U.S. at 396, 109 S.Ct. 1865, and *Franklin,* 31 F.3d at 876. As the district court properly stated, those factors include:

> the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others . . . and whether such person is actively resisting arrest. . . . A detention may be unreasonable if it is unnecessarily painful, degrading, prolonged, or if it involves an undue invasion of privacy.

The officers contend, finally, that the district court improperly placed a "time limit" on how long an officer may lawfully detain an occupant of the premises being searched. But the district court correctly noted that a search carries with it only the "*limited* authority to detain occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (emphasis added). As the district court noted in its order denying reconsideration, "[t]he instruction merely makes clear that that authority does not persist once the search ends or becomes improper." Thus, we reject the officers' final argument regarding the district court's jury instructions on the claim of unlawful detention.

The district court's instructions fairly and adequately addressed the pertinent issues this case presented and they were not misleading. Because the district court did not abuse its discretion in formulating these jury instructions, we reject the officers' argument and affirm the district court's judgment with respect to its jury instructions on unlawful detention.

B. Voir dire and Cross-examination

The officers further contend that the district court abused its discretion in conducting the voir dire and cross-examining defense witnesses. This contention is unfounded. The district court has broad discretion over how it conducts voir dire and how it supervises trials. *Paine v. City of Lompoc*, 160 F.3d 562, 564-65 (9th Cir.1998). We review both the manner in which a district court conducts voir dire and supervises a trial for an abuse of discretion. *See Price v. Kramer*, 200 F.3d 1237 (9th Cir.2000).

The officers argue that the district court conducted voir dire in a way that appeared partial to the plaintiff-appellees, although they do not substantiate this claim. With no supporting evidence in the record, the officers contend that the court's questions were fraught with bias. We disagree. At voir dire, the district court has an obligation to "test the jury for bias or partiality." *Monroe*, 248 F.3d at 856 (9th Cir.2001). In this case, the district court did nothing more than ask questions of potential jurors concerning their ability to render a fair judgment. In fact, the court appeared particularly concerned with assembling a jury with no beliefs favoring or prejudicial to law enforcement officers:

> "Do any of you have any feelings about law enforcement officers that would influence you either in favor of them or against them? . . . Would any of you have any difficulty after you listen to the evidence, all of the evidence that both sides introduce, in trying to figure out

> what you would think is reasonable conduct if [the judge] gave you some general instructions about how to define the term reasonable[?]"

Thus, we reject the claim that the district court abused its discretion at voir dire as baseless.

The officers also argue that the district court's cross-examination of defense witnesses appeared partial and influenced the jury. It is entirely proper for judges "to participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony." *Price*, 200 F.3d at 1253 (quoting *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir.1986)). We have held that:

> [a] trial judge's participation oversteps the bounds of propriety and deprives the parties of a fair trial only when 'the record discloses actual bias . . . or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality.'

United States v. Parker, 241 F.3d 1114, 1119 (9th Cir.2001) (quoting *Mostella*, 802 F.2d at 361). The officers cite no specific example of conduct by which the district court may have abused its discretion. Indeed, upon a review of the trial record, the district court's participation in the examination of witnesses was at all times appropriate, and frequently resulted in clarifying the evidence for both parties. By way of example, the district court asked:

> [U]nder what circumstances, if any, would you ever conclude it was reasonable to remove the handcuffs?
>
> Is it your practice, when you're conducting investigations about reputed gang members, to question people only if you know something about them or know the person to be questioned?

> And if [the police officers'] conduct in the field reflects judgment that is poor, it's your responsibility to discipline them, correct?

Moreover, the district court instructed the jury not to interpret the court's actions throughout the trial as indicating the court's opinion in the matter, and stressed that the verdict was solely for the jury to consider. *See Parker*, 241 F.3d at 1119 (finding no error when nothing in the record indicated actual bias and the court instructed the jury not to infer anything based on development of facts by the judge). Because it was well within the district court's discretion to examine witnesses to clarify the evidence at trial, we deny appellants' request for a new trial based on improper judicial interference.

III. Punitive Damages

The appellants finally appeal the award of punitive damages to plaintiff-appellee, contending that the award should be vacated as unsupported by the evidence. While we review an award of punitive damages for an abuse of discretion, we review a challenge to the sufficiency of evidence to support the award for substantial evidence. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906-07 (9th Cir.2002). A challenge to a jury award of punitive damages must be rejected if there is substantial evidence to support the award. *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir.1999) (en banc). Substantial evidence is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Combs*, 285 F.3d at 907 (quotations and citations omitted).

A jury may assess punitive damages in an action under 42 U.S.C. § 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected

rights of others." *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). There is evidence in the record indicating that the officers had disdain for the house and its residents. Additionally, record evidence suggests that the officers recklessly disregarded Mena's constitutional rights under the Fourth Amendment. Therefore, because substantial evidence exists to support the jury award of punitive damages in this case, we reject the officers' argument regarding the punitive damages award.[19]

Conclusion

The officers are not entitled to qualified immunity; the district court did not abuse its discretion with respect to its jury instructions, voir dire, and its cross-examination of witnesses; and substantial evidence in the record supports the award of punitive damages. Therefore, we AFFIRM the judgment of the district court.

AFFIRMED.

[19] The officers' assertion that there was no evidence presented at trial that either officer had any direct contact with Mena, even if proved, does not insulate them from liability. Supervisory liability may be found in civil rights actions even if the supervisors in question are not directly involved in the acts leading to the constitutional deprivation. *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir.1991) (en banc). Because there is no dispute that the officers were directly responsible for supervising the search, a jury could properly hold them liable.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed January 14, 2004]

No. 01-56673
D.C. No. CV-98-08512-AHM

IRIS MENA,
Plaintiff-Appellee,
and
JOSE E. MENA,
Plaintiff,
v.

CITY OF SIMI VALLEY; RANDY G. ADAMS; MARVIN HODGES; ROY JONES; VINCENT ALLEGRA; ALAN MCCORD; RICHARD THOMAS; RONALD CHAMBERS; WILLIAM LAPPIN; ARNOLD BAYNARD; JEFFREY DOMINICK; JACK GREENBURG; RICHARD LAMB; FRANK AHLVERS; JOHN ADAMCZYK; TIM BROWN,
Defendants,
and
DARIN L. MUEHLER; ROBERT BRILL,
Defendants-Appellants.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before: PREGERSON, REINHARDT, and ARCHER, Jr.,[1] Circuit Judges.

[1] The Honorable Glenn L. Archer, Jr., Senior Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

Order;
Dissent by Judge Kleinfeld;
Dissent by Judge Gould

ORDER

The panel has voted to deny the petition for rehearing and the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the suggestion for rehearing en banc are denied.

KLEINFELD, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, TALLMAN, BYBEE, and CALLAHAN join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc.

This is a qualified immunity case, arising out of the detention of a person in a home that was searched pursuant to a search warrant. The panel held that the police violated clearly established law, as any reasonable officer would have known, when they (1) detained a woman for two or three hours in a garage apartment while a search warrant in a shooting case was being executed in her house; and (2) asked her during the detention whether she was a U.S. citizen. The panel's first holding is contrary to Supreme Court authority. The second conflicts with a Seventh Circuit decision. Both holdings unreasonably interfere with sensible law enforcement and are unsupported by precedent. A reasonable police officer would not have known that either holding was the law, so the defendants were entitled to qualified immunity.

Iris Mena lived at her father's home. It was a single-family dwelling turned into a multi-family dwelling by taking in tenants who put individual locks on their doors. The Simi Valley police, with the help of the SWAT team, entered Mena's home to execute a search warrant. They were investigating a gang-related drive-by shooting. As part of that search, Mena was pulled from her bed by an officer, handcuffed, and led to her garage, where she was detained for the duration of the search. She was dressed in a long-sleeved shirt and sweat pants, but was barefoot for a while until an officer brought her shoes and a jacket. During Mena's detention, a local police officer and an INS agent, whom the Simi Valley police department had brought along because of the gang's significant illegal-alien membership, asked Mena about her citizenship and immigration status, including

whether she had her documentation. When she responded that her papers were in her purse, the police officer took them out of the purse.

I. Asking about citizenship.

The panel creates the extraordinary new proposition of law that it is unconstitutional to ask a person detained for other reasons about her citizenship, without reasonable suspicion. After analyzing the reasonableness of her detention, the panel wrote that the inquiry into citizenship by itself violated a constitutional right, by unduly invading her privacy:

> Furthermore, we note with particular emphasis that the officers *unduly invaded Mena's privacy* by inquiring unnecessarily into her citizenship status. The officers did so presumably because of Mena's apparent Hispanic/ Latino ethnicity, because there was no reason evident in the record to be suspicious of her citizenship status. *On these facts alone, we observe that Mena has alleged a violation of a constitutional right.*[1]

No reasonable police officer would have imagined that this was the law, and no police officer ought to be prevented from asking about citizenship under these circumstances.

One is routinely and properly required to declare one's citizenship when driving back into Alaska from the Yukon Territory, getting off a plane from London at JFK, filling out the I-9 form that every employee is required to sign, and even applying for a fishing license. Yet in the panel's view, asking Mena the same question "unduly invaded Mena's privacy" in violation of the United States Constitution.[2] Far from knowing that this was clearly established law, the violation of which would result in a loss of qualified immunity, a reasonable police officer could not have imagined it. The panel raised and resolved this issue sua sponte; it was not briefed.[3] The officer asking the question was apparently interested in finding out whether Mena was illegally present in the United States, as many of the gang members were. Surely one constitutionally permissible goal of law enforcement is apprehension of persons whose presence in the United States is itself a crime.[4]

[1] *Mena v. Muehler*, 332 F.3d 1255, 1264 (9th Cir.2003) (emphasis added).

[2] *Id.*

The panel suggests that an INS agent needs "*particularized reasonable suspicion* that an individual is not a citizen" before an INS agent can ask about citizenship and that, even then, a local police officer cannot ask unless the police department has entered into an agreement with the INS under 8 U.S.C. § 1357.[5] The whole notion, though, that there is something intimate and private about one's citizenship that is protected by the Fourth Amendment is wrong (the panel did not make a Fifth Amendment self-incrimination or custodial-interrogation argument).

The only other circuit to consider this question went the other way. In *Martinez-Camargo v. INS*,[6] the local police detained a man for working on his car in a vacant lot, and an INS agent asked him about his citizenship. The man revealed that he was an illegal alien. The Seventh Circuit held that there could be no Fourth Amendment violation because "[q]uestions . . . are neither searches nor seizures."[7] That obviously correct proposition should have been adopted by the panel here.

[3] Mena argued in her brief that the questioning was "intrusive" but never suggested that it rose to the level of a constitutional violation.

[4] *See, e.g.*, 8 U.S.C. § 1326.

[5] *Mena*, 332 F.3d at 1264.

[6] *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir.2002).

[7] *Id.* at 493.

The panel relies instead on two traffic-stop cases, the Supreme Court decision in *United States v. Brignoni-Ponce*,[8] and our en banc decision in *United States v. Montero-Camargo*.[9] Neither case is on point. The gravamen of the interference with individual liberty in both was the stop, not the questioning. Both involved traffic stops of persons with Hispanic appearances near the Mexican border. The public interest in policing the border, in *Brignoni-Ponce*, was weighed against "the interference with individual liberty that results when an officer *stops an automobile* and questions its occupants,"[10] and the "interference with lawful traffic" of automobiles on the highway.[11] Likewise *Montero-Camargo* resolved whether ethnicity and other factors sufficed to establish "reasonable suspicion for the stop" of a car proceeding down the highway.[12]

By contrast, asking Mena about her citizenship did not require a stop. She was already stopped for an entirely independent reason. Her detention arose not at all from her ethnicity or the citizenship inquiry, but rather from her presence at a residence being searched pursuant to a search warrant. Because the questions about her citizenship did not require a stop (the detention already being accomplished) these two cases deciding the constitutionality of stops have no bearing on whether questioning Mena was constitutional.

Even if asking Mena about her citizenship was an unconstitutional invasion of her right to privacy, the officers would nevertheless be entitled to qualified immunity. To defeat

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[8] *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

[9] *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir.2000) (en banc).

[10] *Brignoni-Ponce*, 422 U.S. at 879, 95 S.Ct. 2574 (emphasis added).

[11] *Id.* at 883, 95 S.Ct. 2574.

[12] *Montero-Camargo*, 208 F.3d at 1139.

qualified immunity, the panel would then have needed to establish that a reasonable officer would have known about this novel proposition of law.[13] I am unable to imagine the reasonable police officer that the panel envisions.

II. The detention.

The panel also holds that any reasonable officer would have known that it violated the Constitution to treat Mena as the officers in this case did. The problem with this holding is that, instead of following the Supreme Court's decision in *Michigan v. Summers*,[14] the panel expands the room *Summers* left for an exception so far as to eviscerate the rule. The panel based its holding of unconstitutionality, so obvious as to deprive the officers of qualified immunity on the manner of detention, on the fact that the officers "pushed Mena onto her bed, face down, and placed handcuffs on her," then "yanked her up from her bed by her shirt, and led her out of her room in her pajamas."[15] (According to Mena's own description of her clothes in her response to the petition for rehearing, she was actually wearing "green sweat pants, a black long sleeved shirt, and had no shoes on her feet.") And, "although it was raining outside and Mena was barefoot, the officers directed her outside and into a cold garage where she was detained for two to three hours."[16] (According to the petition for rehearing, the garage had been converted into a bedroom with beds and dressers.) Though the panel apparently concedes that handcuffing her at the outset was permissible, it takes the position that she should have been released from the handcuffs sooner than she was because "it was clear" that

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[13] *Saucier v. Katz*, 533 U.S. 194, 201-05, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

[14] *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981).

[15] *Mena*, 332 F.3d at 1262.

[16] *Id.*

she, not being the drive-by shooting suspect, posed no threat to the officers.[17]

Michigan v. Summers holds that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." [18] In *Summers*, as here, the police were executing a search warrant for a house, and, as here, there was no warrant or probable cause to search the individual at issue. Also, as here, the individual was detained while the house was searched. For several reasons, including that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation," [19] and that "a neutral magistrate rather than an officer in the field has made the critical determination," [20] the detention was held to be a "reasonable" seizure of the person under the Fourth Amendment. *Summers* so held even though, as the dissent noted, the record contained "no evidence whatsoever that the police feared any threat to their safety or that of others from the conduct of the respondent" [21] and, under the holding as the dissent read it, the police could make a person "a prisoner in his own home for a potentially very long period of time." [22]

The panel in our *Mena* decision justifies not applying the holding in the Supreme Court decision in *Summers* on the basis of a footnote in *Summers:*

> Although special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an

[17] *Id.* at 1263.

[18] *Summers*, 452 U.S. at 705, 101 S.Ct. 2587.

[19] *Id.* at 702-03, 101 S.Ct. 2587.

[20] *Id.* at 703, 101 S.Ct. 2587.

[21] *Id.* at 708 n. 1, 101 S.Ct. 2587 (Stewart, J., dissenting).

[22] *Id.* at 711, 101 S.Ct. 2587.

> unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case.[23]

We applied the *Summers* footnote in *Franklin v. Foxworth.*[24] But that really was an "unusual case." In *Franklin,* the detainee was an elderly man dressed only in a T-shirt, whose multiple sclerosis made him unable to walk, sit up, or control his bowels.[25] The police handcuffed him, carried him from his bed, and displayed him for an hour on a living room couch with his genitals exposed to the police, his female caretaker, and her son's girlfriend.[26] We took note of how degrading as well as unnecessary the manner of detention was.[27] That is what distinguishes *Franklin* from *Mena.* The only thing bare about Mena was her feet.

Franklin properly gives content to the *Summers* footnote because it really is an "unusual case" in which the manner of detention would clearly, to any reasonable police officer, go beyond the scope of any lawful justification. The detention in *Franklin* involved entirely gratuitous humiliation and degradation. *Mena,* though, is not "unusual." The detention was not unusually long, was not degrading, and lacked any especially "unusual" circumstances. For their own safety and the safety of other occupants, reasonable police officers cannot be held to know that it violates the Constitution to detain for two or three hours a woman fully dressed except for bare feet during a lawful search of a house with many padlocked doors, known to house a member of a gang involved in a drive-by shooting. The *Mena* panel says that "it

[23] *Id.* at 705 n. 21, 101 S.Ct. 2587.

[24] *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir.1994).

[25] *Id.* at 874.

[26] *Id.* at 875.

[27] *Id.* at 878.

was clear" that she could be no threat,[28] but nothing in the opinion explains why a young woman could be no threat were she not effectively controlled. If the footnote in *Summers* can be extended to this case, the holding of *Summers* is deprived of any force. More important, under *Mena,* it is hard to see how police officers could ever conduct a safe and effective search of a home pursuant to a valid search warrant.

The officers here deserve qualified immunity because a person who is constitutionally detained does not have a constitutional right not to be asked whether she is a citizen. And they deserve qualified immunity because when officers are executing a search warrant, they may constitutionally detain the occupants of the premises while the search is being conducted. And they deserve qualified immunity because a reasonable police officer would not have anticipated that the Ninth Circuit would rule to the contrary on both of these issues.

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[28] *Mena,* 332 F.3d at 1263.

GOULD, Circuit Judge, with whom Circuit Judges KOZINSKI and TALLMAN join, dissenting from denial of rehearing en banc:

I would have reheard this case en banc.

First, I disagree with the panel's suggestion that the Constitution is offended by police officers asking Ms. Mena a question about her citizenship. I would follow *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir.2002), holding that a question is not a seizure. *Id.* at 493. Further, even if the Fourth Amendment can be invoked by a query, here the officers had a reasonable basis upon which to inquire, for Ms. Mena was found in a den of thieves, with a gang known by the law to be comprised largely of illegal immigrants. In law, as in life, a person to a degree may be judged by the company they keep, *see, e.g., Maryland v. Pringle*, — U.S. —, 124 S.Ct. 795, — L.Ed.2d — (2003), and nothing in the Fourth Amendment contravenes this common observation of humankind.

Second, the issue of excessive force may be close because of the duration of time that the officers left handcuffs on Ms. Mena. But on this issue we cannot say that a reasonable officer should not have done so. We should instead be more alert to the officers' legitimate concerns for safety. Given the arms anticipated at the locale of the search, and the need to avoid deadly surprise, we should not say that the Constitution precludes ensuring that any person found in potential proximity to weapons is restrained from finding and using a gun on the police. Law enforcement must confront certain unavoidable dangers, but the Constitution does not require that they face avoidable ones.[1]

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[1] The majority's preoccupation with whether Ms. Mena was in pajamas when restrained is besides the point. She was not paraded naked or in humiliating pose. The officers were entitled to restrain her for their safety, whether she was wearing a formal gown or jeans, whether she was

Third, because in this context there was no violation of the Constitution in regard to the questions posed to Ms. Mena on her citizenship, or in regard to the degree of force used to detain and restrain her, under *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), that is the end of the analysis, and we need not go further to assess qualified immunity. But were I to assume a violation of the Fourth Amendment rights that Ms. Mena asserts on either of the above grounds,[2] then I would agree with my colleague Judge Kleinfeld that qualified immunity would be required because no "clearly established" right has been violated.

For these reasons I respectfully dissent.

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wearing pajamas or sweat pants, and without regard to the majority's purported interest in her attire, which seems here to be a mere rhetorical device, wholly unrelated to the substance of the case.

[2] Ms. Mena did not assert that the inquiry on her citizenship status violated her rights. She challenged excessive force in restraint and challenged a search of her purse for papers. The idea that the question about her citizenship posed to Ms. Mena offended her constitutional rights, by analogy to our precedent prohibiting racial profiling as a basis for a car stop, *see United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir.2002) (en banc); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), is extemporaneous, unbriefed, and unwise.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Sep. 6, 2001]

CASE NO. CV 98-8512 AHM (AIJx)

IRIS MENA,

Plaintiff,

v.

CITY OF SIMI VALLEY, et al.,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT OR FOR NEW TRIAL OR FOR JUDGMENT AS A MATTER OF LAW

INTRODUCTION

On June 21, 2001, at the completion of the trial in this case, the jury returned a verdict finding that defendants Darin Muehler and Robert Brill violated plaintiff Iris Mena's Fourth Amendment right to be free from unreasonable seizure by detaining her with force greater than that which was reasonable under the circumstances and by detaining her for a longer period than was reasonable. The jury found defendant Muehler liable to plaintiff in the amount of $10,000 in compensatory damages and $20,000 in punitive damages and defendant Brill liable in the amount of $10,000 in compensatory damages and $20,000 in punitive damages. The Court entered judgment on July 11, 2001.

On July 25, 2001, defendants filed a motion 1) to alter or amend judgment under F.R.Civ.P. 59(e) based on a purported intervening change in qualified immunity law; 2) for a new

trial under F.R.Civ.P. 59(a) on the ground that the Court's unlawful detention jury instruction was legally erroneous; and 3) for judgment as a matter of law under F.R.Civ.P. 50(b) based on an asserted failure of evidence substantiating the jury's punitive damages award. For the reasons set forth below, the Court DENIES defendants' motion.

A. Qualified Immunity

Defendants assert as the basis for their Rule 59(e) motion that "they should have been granted qualified immunity on [the unlawful seizure] claim at the summary judgment stage and that the Supreme Court's opinion in *Saucier v. Katz*, 121 S.Ct. 2151 (2001), which was decided during trial, constitutes an intervening change in the controlling law . . ." Motion, p.2.

The Ninth Circuit has already reviewed and approved this Court's denial of qualified immunity on the unlawful seizure claim at the summary judgment stage of this case. *See Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000). The Ninth Circuit specifically addressed and rejected defendants' contention, made again here, that "they are entitled to qualified immunity as a matter of law because 'a reasonable officer at the scene could have believed that keeping the four detained residents handcuffed and detained together for the duration of the search was reasonably necessary to avoid danger to the officers and residents, reduce the risk of flight, and avoid interference with the search.'" *Id.* at 1039.

Defendants base their challenge to this Court's and the Ninth Circuit's rulings regarding qualified immunity on a purported change in the law effected by *Saucier v. Katz*, 121 S.Ct. 2151 (2001). In that case, addressing excessive force claims, the Supreme Court held that the qualified immunity inquiry requires the "sequential" resolution by the Court of two questions: (1) "taken in the light most favorable to the party asserting the injury, do the facts alleged show the

officer's conduct violated a constitutional right?"; and (2) "whether a right is clearly established," or, in other words, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 2156. In so holding, the Court rejected the Ninth Circuit's position below that "qualified immunity is so intertwined with the question whether the officer used excessive force in making the arrest that qualified immunity and constitutional violation issues should be treated as one question, to be decided by the trier of fact." *Id.* at 2154. The Ninth Circuit's position conflicted with *Anderson v. Creighton*, 483, U.S. 635 (1987).

Defendants' showing that *Saucier* effected an intervening change in the law requiring dismissal based upon qualified immunity is questionable. The Ninth Circuit in *Mena* announced a qualified immunity standard which, like the standard it applied in *Saucier*, called for a two-part inquiry:

> In deciding whether Defendants are entitled as a matter of law to qualified immunity, we must accept the facts in the light most favorable to the Plaintiffs and then determine whether, in light of clearly established principles governing the conduct in question, the officers objectively could have believed that their conduct was lawful. *See Brewster v. Bd. of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971 (9th Cir.1998); *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir.1993). "This standard requires a two-part analysis: 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Id.*

Mena, 226 F.3d at 1036. Defendants do not point specifically to what portion of this standard purportedly deviates from the Supreme Court's statement of the proper qualified immunity inquiry.

However, this Court acknowledges that the Ninth Circuit in *Mena* did not expressly explain why defendants were not entitled to qualified immunity, as distinct from the question of whether a triable issue existed on the unlawful detention issue. Though speculative, defendants could argue that 1) the *Mena* decision conflated the reasonableness inquiry at the heart of plaintiff's unlawful detention claim and the reasonableness inquiry essential to defendants' qualified immunity defense and 2) *Saucier* subsequently disapproved such an approach.

In any event, even under the standard articulated in *Saucier*, defendants are not entitled to qualified immunity. And that is because the first question to consider under *Saucier* is whether, "taken in the light most favorable to the party asserting the injury, do the facts alleged[1] show the officer's conduct violated a constitutional right?" The answer is "yes." Plaintiff alleged and presented evidence that she was only 18 at the time of her detention, was not suspected of any crime, posed no threat to the officers, and did not resist arrest or attempt to flee but nevertheless defendants roused her from sleep at gunpoint, pushed her onto her bed and

[1] Because this case has already been tried, defendants assert, without authority, that "[r]ather than viewing the facts alleged in the complaint, the inquiry may be made in light of the evidence and facts established at trial" Motion, p.11. If the Court does so, at the very least the Court would be influenced by the following factual findings of the jury: 1) defendants "violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by *detaining her with force greater than that which was reasonable under the circumstances*" and 2) "violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by *detaining her for a period longer than reasonable*." Special Verdict Questions 5 and 6 (emphasis added). Even if the Court were not bound to respect such findings if there was an adequate basis to support them, on its own the Court finds that the facts at trial show a constitutional violation.

handcuffed her, refused to inform her why she was being detained, called in the INS to question her about her citizenship status, and kept her handcuffed in her garage for two or three hours, even for a time after the search was terminated. Muller Decl. ¶¶ 4, 7. These facts show that the defendants' conduct violated plaintiff's fourth amendment right to be free from an unlawful seizure. Defendants do not argue otherwise, although at the hearing counsel for defendants stated that they do not concede a constitutional violation. *See* Motion, p.13:7-16.

Defendants assert that it is under the second prong of the *Saucier* immunity inquiry that they enjoy the right to overturn the verdict. The Supreme Court's second step ("if a [constitutional] violation could be made out on a favorable view of the parties' submissions, the [second] step is whether the right was clearly established." *Saucier*, 121 S.Ct. at 2156) is the same as the Ninth Circuit's first step (to find whether the law governing the officer's conduct was clearly established). Defendants emphasize that *Saucier* stated that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates that right." *Id.* at 2156. They argue that Mena's right was not clearly established. The Court disagrees.

As the Ninth Circuit explained in *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994), "[a] detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy." *Id.* (reversing district court's grant of judgment for defendant officers in § 1983 action, and holding that police officers executing search warrant acted unreasonably by removing homeowner from sickbed without providing him a covering and forcing him to remain sitting handcuffed in living room rather than returning him to his bed after they completed the search of his room). The propriety of the search is evaluated under a totality of the

circumstances test, including, but not limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 875-77 (quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). *See also Heitschmidt v. City of Houston*, 161 F.3d 834, 837-39 (5th Cir. 1998) (reversing district court's dismissal of plaintiff's claim that his detention incident to a search of his home for evidence concerning his roommate's alleged prostitution ring exceeded Fourth Amendment reasonableness because defendants handcuffed plaintiff for four hours, refused him bathroom breaks, lured him from his home to the street, had no information that he was connected to the prostitution ring, and because the search was for evidence, not contraband).

Continuing to hold a detainee in handcuffs or failing to return her to her room after a residence has been secured and when there are sufficient officers present has been held to justify a finding that the seizure was unreasonable. *Franklin*, 31 F.3d at 877 ("There is also no justification for the officers' failure to return Curry to his bed after the search of his room had been completed. . . . Certainly it must have been apparent that returning him to his sickbed would involve no risk at all once the officers had searched his room and made certain that there were no weapons or contraband present. However, even had Curry represented some residual threat if left wholly unattended, there was no reason why he could not simply have been taken back to bed and guarded by one or two of the twenty-three armed officers involved in the operation."); *Heitschmidt*, 161 F.3d at 839 ("Heitschmidt's pleadings allege that there were between ten and twelve police officers in the home during the search. Heitschmidt could have been effectively restrained, and the police interest in facilitating the search could have been vindicated, with a far less intrusive detention.").

Under the principles announced and applied in *Franklin* and *Heitschmidt*, the facts here demonstrate that it was sufficiently clear to a hypothetical reasonable police officer that Iris Mena's Fourth Amendment right was violated by the detention as defendants effected it.[2] Although it is true that both *Franklin* and *Heitschmidt* are factually distinguishable, "[a] right may be clearly established even if there is no previous precedent directly on point." *Leveto v. Lapina*, 258 F.3d 156 (3d Cir. 2001) (citing cases) (affirming finding of no qualified immunity for federal officers in unlawful detention case).

Defendants rely on *Torres v. United States*, 200 F.3d 179 (3d Cir. 1999) to argue that in fact it was not clear that the detention of Iris Mena violated her constitutional rights. In that case, the Third Circuit did grant immunity to officers for their detention of plaintiff, in handcuffs, for several hours on his living room couch during the search of his home. However, unlike here, the plaintiff in *Torres*, apparently an adult male, directed agents to "two firearms in his bedroom," while Iris Mena, an 18 year old female, neither had, nor was aware of, nor directed defendants' attention to any contraband, let alone weapons. Indeed, the agents in *Torres* "retrieved firearms, a Glock 9mm semiautomatic and a Ruger .357 magnum, which might be associated with a violent drug operation." (The agents had reason to believe Torres' house was "a key location in a large scale drug ring" and so also had reason to fear destruction of evidence). The officers in *Torres*

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[2] Defendants also argue that even if *Saucier* did not change the law, defendants are entitled to qualified immunity "in light of the jury's determination that the search was lawful." Motion, p.16. Although it is true that officers have the "limited authority to detain occupants of the premises while a proper search is conducted," *Summers*, 452 U.S. at 705, it is also true that the manner of a detention, as well as its duration, can render it unreasonable, even if most of the detention occurred while a proper search was in progress. *Summers*, 452 U.S. at n.21; *Franklin*, 31 F.3d at 876. Defendants' argument therefore fails.

also found ammunition for a third type of firearm that they did not locate during the search "but which they feared might be present." *Torres* is easily distinguishable on these bases and does not diminish the clarity of Iris Mena's constitutional rights.

B. Unlawful Detention Instruction

Defendants also seek a new trial on the unlawful detention claim under F.R.Civ.P. 59(a) "on the ground that the jury instruction pertaining to plaintiff's claim of unlawful detention failed to include the relevant law and was inadequate and prejudicial to these moving defendants and, as such, constituted an error of law requiring a new trial on this claim." Motion, p.18.

The Court gave the following instruction on unlawful detention:

> Generally, a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable.
>
> In determining the reasonableness of a detention conducted in connection with a search, you may look to all the circumstances, including the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee. A detention may be unreasonable if it is unnecessarily painful, degrading, prolonged or if it involves an undue invasion of privacy. A police officer is required to release an individual detained in connection with a lawful search as soon as the officer's right to conduct the search ends or the search itself is concluded, whichever is sooner.

Defendants proffer six purported flaws in the instruction. First, they assert that the instruction does not "inform the jury that police officers may, in fact, *legally* detain occupants during a search." Motion, p.19 (emphasis in original). But the instruction's first sentence states that "[g]enerally, a police officer carrying out a search authorized by a warrant *may* detain occupants of the residence during the search . . ." (emphasis added). The mere absence of the word "legally" or "lawfully," from the clear statement that officers *may* conduct such detentions does not render this instruction invalid or incorrect under the law.

Second, defendants assert that it was error to not specifically instruct the jury that "the authority to detain residents during the execution of a valid search also permits officers to take actions to minimize the risk of harm engendered by the search." Motion, p.20. Defendants correctly cite *Michigan v. Summers*, 452 U.S. 692 (1981), for the dictum statement that a search warrant "may give rise to sudden violence or frantic efforts to conceal or destroy evidence." However, the Court's instruction *did* make clear that the reasonableness of a detention is directly related to the risk of harm associated with the search and the detainee:

> In determining the reasonableness of a detention conducted in connection with a search, you may look to all the circumstances, including . . . whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee.

The instruction did not improperly ignore the importance of the risk of harm to the reasonableness analysis.

Third, defendants argue that the instruction did not make clear that "generally" detentions pursuant to searches are permissible, but "instead instructed the jury that a detention is

only reasonable based upon" certain circumstances. Motion, p.21. However, the instruction specifically provides that police officers "generally" may conduct detentions pursuant to valid searches and goes on to instruct that the lawfulness of such detentions is subject to reasonableness. This is the law. *See Franklin*, 31 F.3d at 876 ("the test of 'reasonableness' applies to the manner in which the police conduct any seizure, including limited detentions of the type imposed on the occupants of the Curry-Franklin residence by the Portland Police").

Defendants assert next that the Court's instruction unfairly emphasized factors in the reasonableness analysis that favored plaintiff's case against them. The instruction enumerated the following factors:

> you may look to all the circumstances, including the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee. A detention may be unreasonable if it is unnecessarily painful, degrading, prolonged or if it involves an undue invasion of privacy—

Though they may not favor defendants, these factors are those specifically enumerated in *Franklin*, 31 F.3d at 876 (stating that "the severity of the crime, whether the person being detained poses an immediate threat, whether he is actively resisting or attempting to flee—may be helpful in the conduct of our inquiry, but so may other factors not ordinarily relevant in deciding how much force is appropriate when making an arrest . . . Persons being arrested are ordinarily suspected of having committed serious, often violent, offenses. Persons being detained while a search of a house is being conducted may simply be visiting a home or business

for an innocuous if not benevolent purpose. A detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy"). Accordingly, defendants' argument fails.

Fifth, defendants assert that the instruction that "[a] police officer is required to release an individual detained in connection with a lawful search as soon as the officer's right to conduct the search ends or the search itself is concluded, whichever is sooner" is not supported by case law and was unnecessary. However, there is no dispute that a search carries with it only the "limited authority to detain occupants of the premises *while* a proper search is conducted," *Summers*, 452 U.S. at 705 (emphasis added). The instruction merely makes clear that that authority does not persist once the search either ends or becomes improper. Clarifying this point of law to the jury was neither improper nor unnecessary.

Finally, defendants assert that the Court failed to instruct the jury on qualified immunity for the detention. However, defendants elsewhere correctly argue that under the law as it exists now, qualified immunity must be determined by the Court, *not* the jury. Defendants cannot have it both ways and accordingly, the Court rejects this argument.

In sum, none of defendants' attacks on the Court's instruction have merit.

C. Punitive Damages

Defendants assert that under F.R.Civ P. 50(b),[3] there was "insufficient evidence to support a punitive damages award." Motion, p.23. The reason they provide is that the moving defendants supervised the search and detentions, but did not personally have direct contact with Iris Mena. Defendants provide no authority for insulating them from liability for punitive damages on this basis.

The jury was properly instructed that punitive damages could be awarded if a defendant's conduct was malicious, defined to be "conduct . . . accompanied by ill will or spite." At least one of these defendants (Officer Brill) volunteered contemptuous, sneering comments about the condition of Mena's home and bedroom to the effect that it was in a state of disarray. Muehler also displayed near-disdain for the occupants of the house. That a jury might find that their conduct was motivated by apparent hostility would be neither surprising nor improper.

Moreover, although Iris Mena was not physically injured during the detention and although she was eventually released, this does not mean that defendants did not recklessly disregard her rights in detaining her in the manner they did. The evidence shown by plaintiff at trial regarding the duration and manner of her detention, described *supra*, is sufficient to support the jury's punitive damages award.

Motion DENIED.

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[3] Plaintiff points out that defendants did not formally move for judgment as a matter of law on the issue of punitive damages at the close of all evidence. But they did object to the Court's proposed punitive damages jury instruction on the grounds that plaintiffs had presented insufficient evidence at trial to support a jury verdict. Under Ninth Circuit law, this objection is "a sufficient approximation" of a directed verdict motion. *See McClaran v. Plastic Industries*, 97 F.3d 347, 360 (9th Cir. 1996).

IT IS SO ORDERED.

DATE: September 6, 2001

/s/ A. Howard Matz
A. HOWARD MATZ
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Jul. 10, 2001]

Case No. CV 98-8512 AHM (AIJx)

IRIS MENA AND JOSE E. MENA,
Plaintiffs,

v.

CITY OF SIMI VALLEY, et al.,
Defendants.

JUDGMENT

This action came on regularly for trial on June 12, 2001, in Courtroom 14, of the above-entitled court, the Honorable A. Howard Matz, Judge presiding. The plaintiffs appeared by attorney James S. Muller and the defendants City of Simi Valley, Darin L. Muehler, Robert Brill, Vincent Allegra, William Lappin appeared by David L. Nye and Karen K. Peabody of CARRINGTON & NYE.

A jury of seven persons was impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was instructed by the Court and the cause was submitted to the jury with a special verdict. The jury deliberated and thereafter returned to the court with its special verdict, which said special verdict was filed with the clerk and entered on the minutes and was in words as follows:

"We the jury in the above entitled action, based upon the evidence presented and on the instructions given to us by the Court, now reach our verdict on the issues submitted to us.

Question NO. 1:

(a) Do you find that defendant William Lappin violated the rights of plaintiffs under the Fourth Amendment to the United States Constitution to be free from unreasonable search by failing to properly knock and announce the presence of the officers at 1363 Patricia Avenue and by unnecessarily destroying property during the initial entry?

_____	X
Yes	No

Please proceed to the next question.

Question NO. 2:

(a) Do you find that defendant Vincent Allegra violated plaintiff Jose Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search by unnecessarily using excessive force on the door into the bedroom known as the "converted porch area" at the home Jose Mena owned at 1364 Patricia Avenue?

_____	X
Yes	No

Please proceed to the next question.

Question NO. 3:

(a) Do you find that defendant Darin Muehler violated the Fourth Amendment rights of Jose Mena or Iris Mena to be free from unreasonable search by permitting or causing the search of 1363 Patricia Avenue to be conducted at portions of the premises other than the bedroom of Raymond Romero and common areas, once Romero's bedroom had been identified?

_____	X
Yes	No

(b) If and only if answered "yes" to part (a), then answer this question: What do you find to be the total amount if

damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of Darin Muehler concerning the continuation of the search?

Amount: $_____

(If you find that Iris Mena suffered no actual damage, you must award him [sic] nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a).

Amount: $_____

(c) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the total amount of damages, if any sustained by plaintiff Jose Mena as a result of the conduct of Darin Muehler concerning the continuation of the search? (If you find that Jose Mena suffered no actual damage, you must award him nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a)).

Please respond to the next question.

Question NO. 4:

(a) Do you find the defendant Robert Brill violated the Fourth Amendment rights of Jose Mena or Iris Mena to be free from unreasonable search by permitting or causing the search of 1363 Patricia Avenue to be conducted at portions of the premises other than the bedroom of Raymond Romero and common areas, once Romero's bedroom had been identified?

_____	X
Yes	No

Please proceed to the next question.

Question NO. 5: Do you find that either of the defendant officers named below violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by

detaining her with force greater than that which was reasonable under the circumstances?

	Yes	No
Darin Muehler	X	____
Robert Brill	X	____

Please proceed to the next question.

Question NO. 6: Do you find that either of the defendant officers named below violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by detaining her for a longer period than reasonable?

	Yes	No
Darin Muehler	X	____
Robert Brill	X	____

Please proceed to the next question;

Question NO. 7: Concerning Darin Mueher, if you answered "Yes" to either question 5 or question 6, then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of Darin Muehler concerning her detention? (If you find that Iris Mena suffered no actual damage, you must award her nominal damage in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to either question 5 or question 6.)

Amount: $10.000.

Please proceed to the next question.

Question NO. 8: Concerning Robert Brill, if you answered "Yes" to either question 5 or question 6, then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Iris Mena as a result of

the conduct of Robert Brill concerning her detention? (If you find that Iris Mena suffered no actual damage, you must award her nominal damage in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to either question 5 or question 6.)

Amount: $10,000

Please proceed to the next question.

Question NO. 13:

(a) Concerning Darin Muehler, if and only if you answered "Yes" to either or both questions 5 and 6, answer this question: Was the conduct of Darin Muehler concerning the detention of Iris Mena malicious, oppressive or in reckless disregard of Iris Mena's rights?

Yes __X__ No _____

(b) If your answer to the preceding question was "Yes," then what do you find to be the amount of punitive damages, if any, that should be awarded to Iris Mena against Darin Muehler concerning her detention?

Amount $ $20,000.

Question NO. 14:

(a) Concerning Robert Brill, if and only if you answered "Yes" to either or both questions 5 and 6, answer this question: Was the conduct of Robert Brill concerning the detention of Iris Mena malicious, oppressive or in reckless disregard of Iris Mena's rights?

Yes __X__ No _____

(b) If your answer to the preceding question was "Yes" then what do you find to be the amount of punitive damages, if any, that should be awarded to Iris Mena against Robert Brill concerning her detention?

Amount $20,000

It appearing by reason to this special verdict, that plaintiff Iris Mena is entitled to judgment against defendant Darin Muehler in the amount of $10,000.00 in general damages and the amount of $20,000.00 in punitive damages.

It appearing by reason to this special verdict, that plaintiff Iris Mena is entitled to judgment against defendant Robert Brill in the amount of $10,000.00 in general damages and in the amount of $20,000.00 in punitive damages.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

Plaintiff Iris Mena have judgment against defendant Darin Muehler in the amount of $10,000.00 in general damages and in the amount of $20,000.00 in punitive damages.

AND, that plaintiff Iris Mena have judgment against defendant Robert Brill in the amount of $10,000.00 in general damages and in the amount of $20,000.00 in punitive damages.

AND, that plaintiff Iris Mena recover costs and disbursements taxed in the sum of $_____ from defendants Darin Muehler and Robert Brill.

AND, that plaintiff Iris Mena recover attorney's fees in an amount to be determined by the court, from defendants Darin Muehler and Robert Brill. Plaintiff shall propose the amounts to defendants' lawyer. If no agreement, make a motion.

DATED: July 9, 2001

/s/ A. Howard Matz
A. HOWARD MATZ
UNITED STATES DISTRICT JUDGE

Submitted by:

LAW OFFICES OF JAMES S. MULLER

By /s/ James S. Muller
JAMES S. MULLER
Attorney for Plaintiffs

Approved as to form and content
CARRINGTON & NYE

By /s/ David L. Nye
DAVID L. NYE
Attorney for Defendants

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 99-56720

IRIS MENA; Jose E. Mena
Plaintiffs-Appellees,
v.
CITY OF SIMI VALLEY,
Defendant,
and
RANDY G. ADAMS; DARIN L. MUEHLER; ROBERT BRILL; MARVIN HODGES; ROY JONES; VINCENT ALLEGRA; ALAN MCCORD; RICHARD THOMAS; RONALD CHAMBERS; WILLIAM LAPPIN; ARNOLD BAYNARD; JEFFREY DOMINICK; JACK GREENBURG; RICHARD LAMB; FRANK AHLVERS; JOHN ADAMCZYK; TIM BROWN,
Defendants-Appellants.

Argued and Submitted Aug. 11, 2000
Filed Sept. 22, 2000

Appeal from the United States District Court for the Central District of California; A. Howard Matz, District Judge, Presiding. D.C. No. CV-98-08512-AHM.

Before: NOONAN, TROTT, and BERZON, Circuit Judges.

TROTT, Circuit Judge:

City of Simi Valley Police Chief Randy G. Adams and several police officers (collectively "Defendants") appeal the district court's denial of their motion for summary judgment

based on qualified immunity. Defendants argue that the district court erred by failing to determine whether, under the clearly established law, the officers reasonably could have believed their conduct in obtaining and executing a search warrant for the residence of Jose and Iris Mena (collectively "Plaintiffs") and in detaining Iris Mena was lawful. We have jurisdiction pursuant to 28 U.S.C. § 1291 and, we AFFIRM in part, REVERSE in part, and REMAND to the district court.

I

BACKGROUND

On January 13, 1998, Officers Darin L. Muehler ("Muehler") and Robert Brill ("Brill") of the Simi Valley Police Department ("SVPD") responded to and began investigating a gang-related drive-by shooting in Simi Valley. During their investigation, Officers Muehler and Brill learned that their primary suspect, Raymond Romero, was in possession of a .25 caliber handgun used in the shooting.

In addition, Raymond's brother, Anthony, told Officers Muehler and Brill that Raymond Romero lived on Patricia Avenue in a "poor house," which Anthony explained was "a residence with a large number of subjects residing in a residence designed for one family." Anthony told the officers also that Raymond Romero's friend (and fellow gang member), Genaro Gonzales ("Gonzales"), had lived at the house on Patricia Avenue, but that he believed Gonzales had moved to Mexico. Anthony explained that his brother kept some of his personal property at their mother's house because "Raymond believes these items would be stolen at the Patricia Avenue location." Finally, Anthony gave the officers his brother's phone number, which was 522-9437.

Subsequently, Officer Muehler had a police dispatcher call Raymond Romero's phone number and pretend there was a problem with the "911" system on Patricia Avenue. The dispatcher asked the man who answered the phone to verify

the address from which he was answering. In response, the man stated that the address was 1363 Patricia Avenue. The dispatcher then asked the man to hang up the phone and dial "911," which he did. The incoming phone number was 522-9437, which was listed to Genaro Gonzales. When the dispatcher asked the man if he was Gonzales, he said "No. A friend," and then he said that his name was Raymond. Based on this telephone call and the information learned from Anthony Romero, the officers concluded that Raymond Romero resided at 1363 Patricia Avenue, Simi Valley, California.

The house located at 1363 Patricia Avenue, which Anthony Romero described as a "poor house," was owned by Plaintiff Jose Mena. Although Jose Mena lived at the Patricia Avenue residence only part-time, his daughter, Iris, was a full-time resident. In addition, several other unrelated boarders lived in the Menas' home, renting rooms in the house, space in the garage, and motorhouses and vans parked in the backyard. Notably, Officers Muehler and Brill both had been to the Mena residence on police business on at least two prior occasions.

On January 29, 1998, Officer Muehler executed an affidavit in support of a warrant to search the Mena house for, inter alia, "[d]eadly weapons, specifically firearms including ammunition, casings, holsters and cleaning equipment, knives and accessories such as sheaves; [and] evidence of street gang membership or affiliation with any street gang. . . ." In describing the Mena house, Muehler stated in the affidavit that Anthony Romero had explained that it was a "poor house," meaning "a residence with a large number of subjects residing in a residence designed for one family." However, Officer Muehler's affidavit did not explain that he had been to the Mena residence before, or that he had observed that all of the doors adjacent to the living room were shut and that some of them had padlocks on them.

Based on Officer Muehler's affidavit, a magistrate judge issued a search warrant for Mena's residence.[1] In particular, the warrant authorized the search of:

> 1363 Patricia Avenue, City of Simi Valley, County of Ventura, State of California, which is further described as a single story, single family dwelling, . . . with an attached garage. . . . To include all rooms, attics, basements, closets, storage areas, attached garages, and other parts therein; and the surrounding grounds and any storage sheds, detached garages, or out buildings of any kind located thereon, any safes or locked boxes therein. Any vehicles that are registered to or belonging to occupants of the residence and that are on or adjacent to the property.

Additionally, the warrant authorized the search of the person of Raymond Joseph Romero.

At approximately 7:00 a.m. on February 3, 1998, several officers from the SVPD, including Muehler and Brill, along with a SWAT team, executed the search warrant on Mena's residence. Defendants claim that, before entering the house, they complied with the knock and announce requirement. Specifically, Defendants declare that they (1) "pounded" on the front door, (2) yelled in both English and Spanish that they were from the SVPD, had a warrant, and intended to enter, (3) waited for approximately thirty seconds, and (4) entered the house after receiving no response. Iris Mena [2] says, on the other hand, that the officers failed to comply with the knock and announce requirement. She bases this claim on her assertion that, although she was sleeping in the bedroom

[1] The magistrate also issued a search warrant for the home of Raymond Romero's mother and brother. That warrant is not at issue in this case.

[2] Jose Mena was not present during the warrant service and execution and, therefore, lacks standing to challenge the officers' compliance with the knock and announce requirement. *See United States v. Valencia-Roldan*, 893 F.2d 1080, 1081 n. 1 (9th Cir.1990).

closest to the front door, she was not awakened by the alleged knock and announce. In any event, the officers used a battering ram to force entry into the Mena home.

After entering the house, the officers observed that some of the rooms were locked, many with padlocks on the outside of the doors. Nevertheless, the officers proceeded to force entry into these locked rooms, including the bedroom in which Iris Mena was sleeping. The officers found Iris Mena in bed, forcibly turned her over, handcuffed her, and detained her in the bedroom until the residence was cleared and secured by the entry team. Once the house was secure, the members of the SWAT team left the premises, and the remaining officers searched the residence.

At that point, Iris Mena and the other residents at 1363 Patricia Avenue were taken to the garage where they were detained, in handcuffs, for approximately two to three hours.[3] During this time, the police refused to inform Iris Mena and the others why they were being detained. Moreover, the police contacted the Immigration and Naturalization Service ("INS"), and INS officers arrived at the scene during the search and interrogated the detained residents, including Iris Mena. Finally, when the officers completed their search, they took Iris Mena back into her home, removed her handcuffs, and told her of the purpose of the warrant and search.

On October 19, 1998, Plaintiffs filed suit under 42 U.S.C. § 1983, alleging that Defendants violated their civil rights in connection with the February 3, 1998 search of their home. In July 1999, Defendants moved for summary judgment on

[3] There is a dispute about the length of the detention. While Iris Mena declares that she was detained for approximately two to three hours, Defendants assert that the detention lasted only about an hour and a half. For purposes of summary judgment, however, we construe the facts in the light most favorable to the non-moving party. *Crystal v. United States*, 172 F.3d 1141, 1147 n. 9 (9th Cir.1999). Thus, we assume that Iris Mena's detention lasted between two to three hours.

the ground that Plaintiffs' constitutional rights were not violated, or, alternatively, that Defendants were entitled to qualified immunity. After reviewing the papers and considering oral argument, on August 10, 1999, the district court issued an order denying the summary judgment motion, holding that because (1) "a reasonable trier of fact could conclude that the warrant and/or its execution was 'overbroad,'" and (2) "a reasonable trier of fact could conclude that Iris Mena's detention was unreasonable," Defendants were not entitled as a matter of law to qualified immunity. Defendants now appeal.

II

QUALIFIED IMMUNITY STANDARD

We review de novo a district court's decision denying summary judgment on the ground of qualified immunity. *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir.1998). In deciding whether Defendants are entitled as a matter of law to qualified immunity, we must accept the facts in the light most favorable to the Plaintiffs and then determine whether, in light of clearly established principles governing the conduct in question, the officers objectively could have believed that their conduct was lawful. *See Brewster v. Bd. of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971 (9th Cir.1998); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). "This standard requires a two-part analysis: 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Id.*

III

ANALYSIS

In their complaint, Plaintiffs allege that Defendants violated their civil rights by (1) obtaining an overbroad search warrant, (2) executing an overbroad search, (3) unlawfully

detaining Iris Mena during the search, (4) conducting the search in an unreasonable manner, and (5) failing to comply with the "knock and announce" requirement. Defendants maintain, however, that they are entitled to qualified immunity because the officers reasonably could have believed that their conduct was lawful under the clearly established law.

A. Overbreadth of the Search Warrant

"The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.'" *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) (quoting U.S. Const. amend. IV). The Supreme Court has held that this requirement is satisfied "if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *Steele v. United States No. 1*, 267 U.S. 498, 503, 45 S.Ct. 414, 69 L.Ed. 757 (1925). Here, there is no doubt that the warrant described the "place to be searched"—1363 Patricia Avenue—with sufficient particularity. Rather, the question is whether the warrant was overbroad because it authorized the search of the *entire* premises at 1363 Patricia Avenue, even though the house was a multi-unit dwelling and probable cause related only to Romero's residential unit and, possibly, common areas of the house.

In deciding whether the warrant was overbroad, we begin with the Supreme Court's decision in *Maryland v. Garrison*. In *Garrison*, the police mistakenly believed that the third floor of a building contained only one residential unit at the time they applied for, obtained, and initially executed a warrant to search suspect McWebb's apartment for narcotics. Thus, when the officers entered the first unit on that floor, which they believed to be McWebb's apartment, they observed and confiscated contraband. The officers later discov-

ered, however, that the unit they were in actually was rented by Garrison, not McWebb. As soon as the officers realized they were in Garrison's unit, they terminated the search. Nevertheless, Garrison was charged with a crime based on the contraband found in his apartment. *Garrison*, 480 U.S. at 80, 107 S.Ct. 1013.

Garrison moved to suppress the evidence, arguing, inter alia, that the warrant was overbroad. The Supreme Court held that the evidence need not be suppressed on this ground because "the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued." *Id.* at 86, 107 S.Ct. 1013. The Court explained however, that

> Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. . . . The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate.

Id. at 85, 107 S.Ct. 1013.

Relying on *Garrison*, Plaintiffs in this case claim that the warrant was overbroad because, unlike the officers in *Garrison*, Officers Muehler and Brill knew or should have known that there were separate dwelling units within the Menas' house. Plaintiffs base this argument on the following facts: (1) Muehler and Brill had been to the house on at least two prior occasions; (2) during one of his prior visits, Officer Muehler observed that all of the doors adjacent to the living room were shut and that some of them were padlocked; and (3) Anthony Romero told the officers that his brother lived in

a "residence with a large number of subjects residing in a residence designed for one family."

Although we accept these declarations as true, we reject Plaintiffs' assertion that the warrant was overbroad. There is absolutely no evidence in the record sufficient to create a genuine issue of material fact that either Officer Muehler, Officer Brill, or any other officer of the SVPD knew or should have known prior to the application for the warrant that the Mena residence was a multi-unit dwelling. While it is true that Muehler and Brill both had been to the Mena residence on prior occasions, they were in the house for only a short time. Furthermore, although Muehler testified in his deposition that he observed that all of the doors adjacent to the living room were shut and that some of them were padlocked, he also testified that he did "not know[ ] where those doors led." No evidence refutes this statement. Officer Muehler's description in the affidavit prepared for the warrant of the residence is both accurate and materially consistent with the extrinsic facts as he knew them at the time. The fact that Anthony Romero told the officers that his brother lived in a "residence with a large number of subjects residing in a residence designed for one family" does not suggest that the officers knew or should have known that the house was a multi-unit dwelling. The facts in this case are plainly distinguishable from the facts in *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir.1997), wherein we denied qualified immunity to officers because the plaintiffs there made a sufficient showing of "deliberate or reckless dishonesty" on the part of the affiant for a disputed search warrant.

Under the circumstances, Defendants reasonably could have believed at the time the warrant was issued that there was probable cause to search the entire premises. *Cf. United States v. Williams*, 917 F.2d 1088, 1091-92 (8th Cir.1990) (holding that officers were entitled to qualified immunity because they did not know the residence for which they

obtained a warrant actually contained multiple units). Accordingly, we hold as a matter of law that Defendants are entitled to qualified immunity with regard to the claim that the search warrant for 1363 Patricia Avenue was overbroad. In this respect, we remand with instructions to enter a summary judgment in favor of all Defendants.

B. Overbreadth of the Search

Plaintiffs' next argument is that the manner in which the search warrant was executed violated their constitutional rights because, even after realizing that there were multiple units within the Mena house, the police searched the entire premises, including the individual residential units. Defendants counter that the execution of the search was valid because probable cause existed to search the entire premises, not just Romero's room and the common areas. We disagree with Defendants.

Police officers' authority to search premises that are described in a warrant is not unlimited. "If, during the search, the officers become aware that the warrant describes multiple residences, the officers must confine their search to the residence of the suspect." *United States v. Kyles*, 40 F.3d 519, 524 (2d Cir.1994) (citing *Garrison*, 480 U.S. at 86-87, 107 S.Ct. 1013). To determine whether the officers should have realized they were searching the wrong residence, the *Garrison* court set forth the following standard: "[T]he validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor *depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable.*" *Garrison*, 480 U.S. at 88, 107 S.Ct. 1013 (emphasis added).

Here, shortly after beginning the search, the evidence and the reasonable inferences it supports are sufficient to suggest that the officers should have realized that the Menas' house

was a multi-unit residential dwelling and, thus, that the warrant was actually overbroad. When the officers first entered the house, they observed that many of the rooms were padlocked from the outside. Furthermore, upon forcing entry into the locked rooms, the officers saw that the rooms were set up as studio apartment type units, with their own refrigerators, cooking supplies, food, televisions, and stereos. Considering that Officers Muehler and Brill knew that a large number of persons lived in the house, and that Muehler had observed the padlocked doors on a prior occasion, we agree with the district court that a jury could conclude from these facts that the officers' search beyond Romero's room and common areas was unreasonable.

Defendants argue nevertheless that they are entitled to qualified immunity because their conduct in executing the warrant and in searching the entire premises was objectively reasonable. Generally, if a structure is divided into more than one occupancy unit, probable cause must exist for each unit to be searched. *United States v. Whitney*, 633 F.2d 902, 907 (9th Cir.1980). This rule, however, is not absolute. For example, we have held that

> a warrant is valid when it authorizes the search of a street address with several dwellings if the defendants are in control of the whole premises, if the dwellings are occupied in common, or if the entire property is suspect.

United States v. Alexander, 761 F.2d 1294, 1301 (9th Cir.1985); *see also United States v. Frazin*, 780 F.2d 1461, 1467 (9th Cir.1986).

Defendants maintain that there was evidence that the entire premises were suspect because Romero had access to all parts of Mena's residence. Specifically, they argue that the following facts support this conclusion: (1) Romero previously had secreted a gun at the residence of a fellow gang member; (2) Gonzales, a gang member, had also lived at 1363 Patricia Avenue, although it was believed he had moved to Mexico;

(3) street gang members often hide weapons and evidence in their homes and the homes of fellow gang members; (4) Romero had access to areas of the premises occupied by other residents, as evidenced by the fact that he answered Gonzales's phone; and (5) other residents had access to Romero's possessions, as evidenced by the fact that he was worried that some of his belongings might be stolen. In short, Defendants appear to be arguing that, because Romero and Gonzales were gang associates, and they both lived in this house, the police had probable cause to search the *entire* premises at 1363 Patricia Avenue.

We reject Defendants' argument because, at most, the aforementioned facts provided the officers with probable cause to search Romero's room, Gonzales's room (if he still lived there), and common areas. On the other hand, there is virtually no evidence in the record to show that Romero had access to or was in control of the locked rooms inhabited by the other residents, such as Iris Mena.

As the district court correctly stated, "the law is well established that the officers 'were required to discontinue the search of [Plaintiffs' property not reasonably in Romero's control] as soon as they discovered that there were [other] separate units [on the property] and therefore were put on notice of the risk that they might be in a [portion of the property] erroneously included within the terms of the warrant.'" (quoting *Garrison*, 480 U.S. at 87, 107 S.Ct. 1013). Because a reasonable jury considering all the facts could determine that it was unreasonable for the officers to continue the search, we affirm the district court's denial of qualified immunity on this claim.

C. Unlawful Detention

Third, Plaintiffs contend that Iris Mena's detention was unlawful on the basis of its duration and the manner in which

it was carried out.[4] Defendants once again assert that they are entitled to qualified immunity as a matter of law because "a reasonable officer at the scene could have believed that keeping the four detained residents handcuffed and detained together for the duration of the search was reasonably necessary to avoid danger to the officers and residents, reduce the risk of flight, and avoid interference with the search." Because we conclude that the evidence raises triable issues regarding the reasonableness of the detention, we affirm the district court.

The Supreme Court has held that

> If the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search his home. Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.

Michigan v. Summers, 452 U.S. 692, 704-05, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (footnotes omitted). However, the Court included a caveat: "[S]pecial circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case. . . ." *Id.* at 705 n. 21, 101 S.Ct. 2587. Thus, "while detentions of occupants during the period of a search will under most circumstances prove to have been reasonable, a detention may be unreasonable in a particular instance either because the detention itself is improper or because it is carried out in an unreasonable manner." *Franklin v.*

---

[4] Plaintiffs also contend that Iris Mena's detention was so extensive that it constituted an arrest, and that such an arrest was not supported by probable cause. This discrete issue is not before us on appeal.

Foxworth, 31 F.3d 873, 876 (9th Cir.1994); *see also Liston v. County of Riverside*, 120 F.3d at 977-79.

In *Franklin v. Foxworth*, this court denied law enforcement officers qualified immunity on an unlawful detention claim. *Foxworth*, 31 F.3d at 876-78. We held that

> A detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involved an undue invasion of privacy. Detentions, particularly lengthy detentions, of the elderly, or of children, or of individuals suffering from serious illness or disability raise additional concerns. Of course, the presence of any of these factors in an individual case does not establish that the detention is unreasonable *per se*. Rather, these factors, along with the *Graham* elements [5] and any other circumstances relevant to an individual case, must be assessed in their totality.

Id. at 876. Applying this standard, the *Foxworth* court concluded that the police "executed the warrant in an unreasonable manner, first by removing a gravely ill and semi-naked man from his sickbed without providing any clothing or covering, and then by forcing him to remain sitting handcuffed in his living room for two hours rather than returning him to his bed within a reasonable time after the search of his room was completed." *Id.* at 876-77. In reaching this conclusion, the court reasoned that

> None of the officers had any reason to believe, on the basis of the information they had prior to the search or their observations once in the house, that Curry had committed a crime, or that he was armed. In fact, the officers were not even aware that Curry lived in the house prior to executing the warrant. It should also have been clear to them that Curry was not a gang member.

[5] The "*Graham* elements" are those elements enumerated in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), including the severity of the crime, whether the person being detained poses an immediate threat, and whether the suspect is actively resisting arrest or attempting to flee. *Id.* at 396, 109 S.Ct. 1865.

Id. at 877.

Three years after *Foxworth*, we decided *Liston v. County of Riverside*. In *Liston*, law enforcement officers executed a search warrant for 8293 Saddlecreek Drive, Glen Avon, California. *Liston*, 120 F.3d at 968. The intended target of the search was James "Rocky" Hill. *Id.* At the time the warrant was executed, however, Hill no longer resided at the Saddlecreek residence. *Id.* As a result, the officers mistakenly detained and searched the home of Jim Liston and his family. *Id.*

The Listons sued the officers under 42 U.S.C. § 1983 arguing, inter alia, that their detention was unreasonable and, thus, in violation of the Fourth Amendment. In evaluating this claim, we discussed *Summers* and *Foxworth* and recognized that we must apply a "totality of the circumstances" test. We held that the officers were not entitled to qualified immunity because

> under the Listons' versions of the facts, the officers continued to detain them long after a reasonable officer would have known that the wrong people were in custody and that the house was no longer owned or occupied by Hill—and, thus, long after there was any reasonable cause for continuing to invade the Listons' privacy.

Id. at 979.

We conclude that, like *Foxworth* and *Liston*, the case at bar may be an example of the "unusual case" contemplated by the Supreme Court in *Summers*. In the course of executing a warrant—the intended target of which was Raymond Romero—Defendants forcibly removed Iris Mena from her

bed, handcuffed her, brought her into the garage in her sleeping clothes, and forced her to remain there for two to three hours. Because we have now concluded that this search warrant was not invalid, the *Summers* rule would permit these officers as a matter of law to detain Ms. Mena while "a proper search is concluded." *Summers*, 452 U.S. at 705, 101 S.Ct. 2587. And, if the jury here should conclude that the officers did have probable cause to search the entire premises—even after discovering that the Mena's house was a multi-unit residential dwelling as defined in *Garrison*—then the lawful authority to detain Ms. Mean would continue—and a reasonable officer could so conclude on these facts. However, if the jury should conclude that the officers did not have probable cause to search areas other than (1) Romero's room, (2) Gonzales' room, and (3) common areas, then Ms. Mena's detention rests on a different footing and may be justified only in connection with whatever search the jury concludes to have been "proper."

Defendants have produced no evidence that Ms. Mena had committed a crime, posed any sort of threat to the officers, or was in any way resisting arrest or attempting to flee. *See Graham*, 490 U.S. at 396, 109 S.Ct. 1865. In fact, the videotape footage reveals that Ms. Mena, who was only 18 years old at the time, appeared to be sitting quietly and cooperating with the officers. Nevertheless, the police refused to inform Ms. Mena why she was being detained, called out the INS to question her about her citizenship status, and kept her handcuffed throughout the entire two to three hour detention.

Because a jury could conclude on the totality of these facts and circumstances that Iris Mena's detention past the point of a proper search violated the Fourth Amendment, we affirm the district court with respect to her unreasonable detention claim. It, too, shall be decided by a trier of fact.

D. Conduct During the Search

Next, Plaintiffs assert that the officers violated 42 U.S.C. § 1983 by conducting the search itself in an unreasonable manner, in particular by callously and needlessly ransacking their home and destroying property. We have held that "officers executing a search warrant occasionally 'must damage property in order to perform their duty.'" *Liston*, 120 F.3d at 979 (quoting *Dalia v. United States*, 441 U.S. 238, 258, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979)). Therefore, the destruction of property during a search does not necessarily violate the Fourth Amendment. *United States v. Becker*, 929 F.2d 442, 446 (9th Cir.1991). Rather, "only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *Liston*, 120 F.3d at 979; *see also Becker*, 929 F.2d at 446.

Here, Iris Mena testified in her deposition that, during the search, the officers unnecessarily broke down two doors that were unlocked. ("And the door that was in the garage, it was already open, and they broke it anyways. And another room that is right in front of Ray's room, it was open, too, at that time, and they broke it, too."). In addition, Ms. Mena testified that she saw Officer Allegra kicking a door on the patio that was already open and saying "I like to destroy these kind of materials, it's cool." In light of this testimony, Defendants appear to have damaged Plaintiffs' property in a way that was "not reasonably necessary to execute [the] search warrant." *Becker*, 929 F.2d at 446. Because a reasonable officer would have known that such conduct if proved was unlawful, we affirm the district court.

E. Knock and Announce

Lastly, Plaintiffs claim that Defendants violated the Fourth Amendment by failing to "knock and announce" before forcing entry into their home. Specifically, Plaintiffs argue that, because Iris Mena, who was sleeping in the bedroom

nearest the front door, was not awakened by the alleged "knock and announce," the police either did not "knock and announce" at all, or they did not "knock and announce" loudly enough to constitute adequate notice. Defendants respond that, in fact, they did comply with the "knock and announce" requirement and, therefore, are entitled to qualified immunity.

The district court denied Defendants' summary judgment motion on this issue because, in light of Iris Mena's and the officers' contradictory testimony, there is an issue of fact as to whether the police announced themselves before forcing entry into the Mena home. We agree that there is, on summary judgment, a triable issue of fact on this question, and affirm the district court.

IV

CONCLUSION

For the foregoing reasons, we affirm the district court, except as to the claim that the warrant itself was on its face overbroad. On this claim, we reverse the district court and remand for the entry of summary judgment in favor of the Appellants. AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with the views expressed herein.

The parties shall bear their own costs of this appeal.

Supreme Court, U.S.
FILED
MAY 13 2004
OFFICE OF THE CLERK

(3)

No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER and ROBERT BRILL,
Petitioners,

vs.

IRIS MENA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER and ROBERT BRILL,
Petitioners,

vs.

IRIS MENA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S OPPOSITION TO PETITIONERS' WRIT OF CERTIORARI

Respondent Iris Mena submits this brief in opposition to the petition for writ of certiorari filed by petitioners Daniel L. Muehler and Robert Brill. Petitioners, who are police officers for the City of Simi Valley, seek to review the verdict reached by the jury and affirmed by the courts below that respondent's detention violated the Fourth Amendment and that petitioners were not entitled to qualified immunity.

There was ample evidence demonstrating the unreasonableness of respondent's detention, as the jury, district court and the Ninth Circuit correctly concluded. Moreover, the Ninth Circuit's opinion was in accord with the principles set forth by this Court in *Michigan v. Summers*, 452 U.S. 692 (1981). The unlawfulness of the officers' actions was clearly established at the time of respondent's detention. Moreover, there is no conflict between the decision in this case and the decisions of other circuit courts.

This is an inappropriate case to resolve the issue of whether mere questioning of an already lawfully detained individual constitutes an additional, unconstitutional seizure. Petitioners attempt to create a "compelling reason" for this Court to grant review by focusing heavily on the portion of the Ninth Circuit's opinion concerning respondent being questioned by the police officers about her citizenship. However, this portion of the opinion was unnecessary to the court's affirmance of the jury's verdict that the manner in which this detention was conducted was unreasonable.

Moreover, the Ninth Circuit did not hold that the questioning of respondent about her immigration status during her detention amounted to a separate seizure and an independent Fourth Amendment violation. This claim was not before the court. The questioning in the circumstances of this case was just one of many factors the jury considered in finding the extent of respondent's detention to be unreasonable.

The distinct factual and legal setting of this case also means that it is an inappropriate case to determine the permissible scope of questioning during traffic stops, stops at border checkpoints, or immigration detentions, which is precisely what petitioners urge this court to do with this case. Ultimately, the case prevents no "compelling reason" for review under SUP. CT. R. 10 and is ill-suited to resolve the issues petitioners identify.

STATEMENT OF THE CASE

A. Statement of Facts

On February 3, 1998, at approximately 7:00 a.m., officers of the Simi Valley Police Department SWAT team, including petitioners, forcibly gained entry into respondent's home at 1363 Patricia Avenue with a battering ram, to execute a search warrant relating to Raymond Romero, a tenant of respondent's parents who was not present at the time. ER 66.

The police came in with overwhelming force. There were at least eighteen officers present at the scene. Once the SWAT team made the initial entry and cleared the residence within minutes, police were confronted with four non-threatening non-suspects who had nothing whatsoever to

do with the suspect, Raymond Romero, or with any gang or criminal activity.

Respondent Iris Mena, an 18 year-old Salvadorian immigrant, was asleep in her bedroom located very near the point of entry when she was suddenly awakened by a loud bang. ER 111; SER 38. Her mother and father were both at work at the time of the search and thus respondent was alone and in an extremely vulnerable position. The bang was immediately followed by the forced entry of at least one armed man in dark clothing into her locked room. SER 111. The man pointed semi-automatic weapons in respondent's face as she awoke and ordered her to stand up and put her hands behind her back. ER 112; SER 78. She complied and was immediately grabbed by the hands and pushed face first onto the bed. ER 113.

Respondent initially had no idea who the men entering her home were or why they had entered her home. Respondent feared that the men had come to rob or kill her and she was terrified. ER 113-14. Respondent testified that during this initial encounter no one identified himself as a police officer. ER 112-14. Only when the man who pushed her onto the bed handcuffed her did respondent believe that the armed individuals in her house were police officers, because she believed that these were "the only persons who put handcuffs on people." ER 113. After being handcuffed, respondent was grabbed by the back of her shirt, pulled off the bed and led out to a garage. Id.

Petitioners Brill and Muehler played a pivotal role in the early morning operations. Petitioners supervised the execution of the search and were also in charge of overseeing the detention of the occupants of the house. ER 86 - 87, 172.

It was petitioner Muehler who ordered respondent and the three other persons found on the property be taken to the adjoining converted garage. SER 55. Petitioner Brill came into the garage several times during respondent's detention, SER 62, and either of the petitioners could have released her at any time. SER 55, 62.

Respondent was led outside in order to reach the garage. It was pouring rain on that morning and the ground was wet. ER 66, 115. At the time of her initial detention, respondent was wearing only green sweat pants, a black long sleeved shirt and had no shoes on her feet. ER 115. Respondent was forced to walk outside in the cold, pouring rain with no jacket and no shoes. Only after she had been exposed to the elements and sat in the damp garage in uncomfortable handcuffs for a half an hour to an hour did officers give respondent a jacket and some shoes to wear. ER 122, 131.

While she was held in the garage, an officer asked respondent if she was a legal resident of this country, even though this question was irrelevant to the purpose of the search. ER119-120. An INS officer, who petitioners brought on the search, ER 178-79, then asked respondent intrusive questions about her immigration status and inquired where her papers were. ER 120. Respondent, a legal resident of this country, ER 109, 120, stated that her documentation was in her purse and a police officer then went and searched it without respondent's permission. ER 120. The officer handed the documentation over to the INS agent. ER 120.[1]

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[1]Indeed, it was part of the respondent's theory of the case and the evidence presented that petitioners treated respondent so badly because they thought illegal aliens lived at the Mena's home, a home they described as a "poorhouse." ER 261-62. Moreover, petitioners had

During her detention, respondent also observed a female videotaping in the garage where she and the other residents of the premises were being detained. Respondent, who had not given the police permission to videotape her, was concerned about this additional intrusion into her privacy. ER 124-25. She asked an officer about the videotaping. ER 125. Instead of alleviating her anxiety and treating her with a modicum of respect, the officer yelled at her that it was part of their job to do that, and gave her no further explanation about the videotaping. ER 125.

Respondent was the only occupant present within the main house the morning of the search. She was not shown a search warrant or given an explanation for the search until after the search ended. ER 118. While she was held she heard and saw officers breaking things, including a door, in her home, all without the slightest explanation. ER 120-21. Respondent made repeated attempts to elicit an explanation for her detention from the officers who were in the garage with her and the other detainees. ER 117-18. She received either evasive responses or no responses at all. Id. On at least one occasion the officer whom she asked replied that they were not in charge of the operation and hence were not authorized to give her an explanation. ER117. She could hear officers breaking doors and inflicting damage to property in her home, while she was detained in a garage and treated as a person with no rights. ER 120-21.

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previously made a call to the Mena residence, though not for any gang affiliated activity. SER 47-48, 72-73. Thus, the unnecessarily harsh treatment of respondent on the morning of the search could properly have been viewed by the jury as payback for petitioners' prior exposure to the Mena family and petitioners' negative view of the occupants of the Mena home, rather than as legitimate law enforcement actions.

Petitioner Muehler acknowledged during trial that he and petitioner Brill were the ones in charge of overseeing the detentions, and that part of this task entailed addressing the questions of the individuals being detained. ER 182. Petitioners never approached respondent to give her an explanation, or to show her a search warrant, even though petitioners came to the garage during respondent's detention several times. SER 62, 97.

Respondent was detained in the garage in handcuffs for the duration of the search. SER 92. She testified that the handcuffs were "real uncomfortable," ER 119, and that they became even more uncomfortable as time progressed. Id. Respondent asked officers to remove the handcuffs but she was informed that "it was part of their job" to handcuff her, and that the "their highest officer" had ordered this. ER 118. Given the officer's attitude towards her from the beginning of the search, further requests would have seemed futile in her circumstances.

Petitioners justified respondent's detention and handcuffing by claiming they did not know the extent of respondent's involvement with Raymond Romero, the main target of the search, and also claimed "concern" that she might interfere with the search. ER 93. However, at trial, officers admitted that they did not suspect respondent of being involved in any crime, and agreed with the observation that respondent was completely cooperative throughout the entire ordeal from beginning to end. SER 40-41, 54. Searches of respondent's person and room, SER 19 (Exhibit. 13); 51, produced no contraband or any evidence of gang membership, SER 48-49, 51, 61, or criminal activity of any kind. SER 60-61. Petitioners never had any information that respondent

or her family were connected to any gang or criminal activity. Id. Indeed, respondent was never questioned about any gang activity or about anything other than her immigration status. Moreover, petitioners' knew that this was not a gang safe house. Petitioners in their affidavit of probable cause identified respondent's home as a "poorhouse." Petitioners admitted at trial that on their visit to the location one month prior to the search they encountered numerous residents but no one who they identified as gang members. Petitioners' information was that the only gang member who currently resided at the residence was Raymond Romero. Petitioners also had adequate personnel at their disposal to remove respondent's handcuffs after they cleared the residence and learned that Raymond Romero was not present. SER 167. In fact, within minutes the search site was deemed Code 4 "which means everything was calm and the risks were minimized." SER 86.[2]

Respondent remained in the garage, handcuffed and in great discomfort, for between two to three hours. ER 196. *Respondent was held this way for at least fifteen minutes to an hour after the search of the residence had been completed.* Respondent testified that her handcuffs were not taken off until she was brought into the living room. The police videographer testified that she was brought in to videotape the location after

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[2]Both SWAT Commander Lt. Thomas and defense expert witness Joseph Callanan testified on cross-examination that standard police procedure is that non-suspect detainees, who pose no threat to police officers should be released after they have been patted down for weapons and identified. SER 102-04 (Thomas); SER 138-43 (Callanan). Indeed, Mr. Callanan's testimony on cross-examination fully supported respondent's claim that petitioners had no justification for detaining respondent in handcuffs as long as they did. In addition, the tactical plan for this search provided for this. SER 8 (exhibit 11); 56, 96; ER 89.

the search was completed. SER 52, 115-17. Yet, the post-search videotape, which has a time stamp indicating it was made two hours after the SWAT team's entry, does not show respondent in the living room at all. Instead, it shows petitioner Muehler completing paperwork in the living room while respondent remained handcuffed in a cold garage. Petitioner Brill admitted that respondent was not released until at least ten to fifteen minutes after the search was concluded. Respondent testified that she was held as long as three hours. Therefore, the evidence at trial allowed the jury to find that respondent was held for as long as one hour after the search had been concluded. ER 89, SER 52, 115-117. At trial, the officers provided no justification for maintaining respondent under restraint after the search had ended.[3]

B. Proceedings Below

Respondent filed an action pursuant to 42 U.S.C. § 1983 alleging, in part, that the City of Simi Valley and eighteen of its officers, including petitioners, violated her rights under the Fourth and Fourteenth Amendments by unlawfully detaining respondent during the search of her home.

Before trial, all of the individual officers moved for summary judgment based on the affirmative defense of qualified immunity. ER 304. The district court denied the motion as to all but one of the officers and the remaining officers filed an interlocutory appeal contending that the United States Supreme Court's decision in *Michigan v Summers*, 452 U.S. 692, 705 (1981), gave them authority to detain residents during the lawful execution of a valid search warrant. On

[3]Respondent testified that she still suffers from nightmares, suffered humiliation and fear. ER 113, 118.

September 22, 2000, the Ninth Circuit held, *inter alia*, that the officers were not entitled to qualified immunity with regard to plaintiffs' claim that the circumstances of her detention violated the Fourth Amendment. *Mena v. Simi Valley*, 226 F.3d 1031, 1038-41 (9th Cir. 2000) ("*Mena I*"). The case was remanded for trial on plaintiff's remaining claims, including her unlawful detention claim.

On June 21, 2001, the jury found that petitioners violated plaintiff's Fourth Amendment rights by detaining her "with greater force than which was reasonable under the circumstances" and "for a period longer than reasonable." ER 273-274. The jury sided with petitioners on all other claims. ER 270-272. The jury awarded respondent $10,000 in compensatory damages and $20,000 in punitive damages against each of the petitioners. ER 276-277.

On July 24, 2001, petitioners filed a motion to amend the judgment, which was denied by the district court in an extensive opinion. ER 288. Petitioners appealed.

The Ninth Circuit upheld the trial court's ruling in *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003) (*Mena II*). It found that there were ample facts demonstrating the existence of an unreasonable seizure in violation of the Fourth Amendment. In particular, the Court noted: 1) respondent was awakened abruptly by a loud noise and opened her eyes to find a person dressed in black pointing a gun in her face; 2) no officer during this initial encounter identified himself as an officer and respondent believed that the persons in her room had come to rob her; 3) the officers searched respondent and her room, yanked her up from her bed by her shirt, and led her out of the room in her pajamas; and 4) although it was raining outside and respondent was barefoot,

the officers directed her outside and into a cold garage, where she was detained for two to three hours. *Id.* at 1261-1262. The Court found that these "heightened security measures" were unjustified in light of the fact that it was clear respondent posed no threat to the safety of the officers; the search of her room and residence produced no evidence of gang membership; respondent was not a suspect in the crime; and, although the 18 well armed S.W.A.T. members secured the house in a matter of minutes, she was handcuffed and detained for two to three hours. Based on these circumstances alone, the Court concluded that her detention was objectively unreasonable and "unnecessarily degrading [and] prolonged." *Id.* at 1263-1264.

The Court also found that the officers's questions about respondent's citizenship status and search of her purse for proof of citizenship also rendered her detention unreasonable. The Court did not find this to be a separate seizure, but rather a factor which rendered her *Summers* detention unreasonable. *Id.* at 1264-1266. However, it is clear that the Court found respondent's detention to be unreasonable and in violation of the Fourth Amendment independent of the questioning of her immigration status and the search of her purse. Thus, the portion of the opinion concerning the officer's questions regarding her immigration status was unnecessary and was dictum.

Petitioner's suggestion for a rehearing en banc was denied on January 14, 2004.

REASONS FOR DENYING THE PETITION

I. The Ninth's Circuit's Decision Is Consistent with *Michigan v. Summers* and Does Not Conflict with Rulings in Other Circuits.

A. Determining the Reasonableness of Respondent's Detention Is a Fact-specific, Individualized Inquiry.

The only issue this case presents is whether respondent's detention during the officers' search of her parents' home was unreasonable pursuant to the principles set forth by this court in *Michigan v. Summers*. The facts of this case and the opinions below simply do not raise any novel issue of law or any important question for this Court to decide given this limited fact-based context.

In *Michigan v. Summers*, 452 U.S. 692 (1981), this Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the *limited authority* to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705. (Emphasis added). However, *Summers* also held that "special circumstances" or "a prolonged detention" and other detentions which are not "routine" could give rise to a Fourth Amendment violation. *Id.* at 705 n. 21. Thus, *Summers* holds that police have limited authority to detain the occupant of a house without probable cause during the search when the detention is neither prolonged or unduly intrusive.

Petitioners do not dispute this reading of *Summers*. Rather, they claim that the Ninth Circuit's ruling is an expansive interpretation of *Summers* that conflicts with the

decisions of other courts of appeals. However, whether a particular seizure is reasonable is a fact-specific inquiry that varies from case to case. As stated by this Court in *Graham v. Connor*, 490 U.S. 386, 398 (1989), when determining the reasonableness of a detention courts must pay "careful attention to the facts and circumstances of each particular case." The court must weigh factors "including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers and others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. This is what occurred in this case.

The fact-specific inquiry a court must engage in to determine the reasonableness of a particular detention thus belies any assertion that the Ninth Circuit's ruling somehow expands *Summers* or conflicts with the rulings in other courts of appeal. The jury, the district court, and the Ninth Circuit concluded, based on the facts before them, that respondent's detention was unlawful. As demonstrated below, this conclusion was certainly reasonable given the facts of this case. Indeed, what petitioners present as a conflict between the circuits is actually just an account of different assessments of reasonableness in the particular circumstances of the cases and not a conflict about the applicable legal norms.

B. The Ninth Circuit's Decision Was a Correct Application of *Michigan v. Summers*.

Petitioners ignore the requirement that the facts must be viewed in the light most favorable to the jury verdict when determining the lawfulness of respondent's detention. There is little doubt that the facts of this case support the jury's verdict that respondent's detention was prolonged, unduly intrusive and and hence unreasonable.

Respondent was an 18 year-old female at the time of the detention. Although she was not a suspect, the officers broke into her room and pointed guns into her face without identifying who they were. After complying with the officers' commands to stand up and put her hands behind her back, respondent was grabbed by her hands and pushed face first onto the bed. After being thrown on the bed, respondent was handcuffed and yanked up by her shirt and led outside in the pouring rain and cold in her pajamas and without shoes. Respondent was subsequently made to sit in a damp and cold garage for a half hour to an hour before she was finally brought a jacket and shoes to put on.

Respondent complained to the officers that her handcuffs were too tight and uncomfortable but they refused to loosen them.[4] Respondent was detained and kept in handcuffs for at least three hours in the damp garage even though she posed no threat to the safety of the officers and she made no attempts to flee or destroy any contraband. There was also no evidence she was affiliated with any gang or that she had committed any crime. Respondent was compliant with the officers' commands at all times and the officers conceded at trial that they did not believe she posed a threat. Further, there were 18 officers involved in the search and the premises were secured in a matter of minutes. Finally, respondent remained in handcuffs for at least 15 minutes to an hour *after* the search had been completed.

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[4]Petitioners assert that because respondent did not specifically state the handcuffs were painful the officers did not loosen them. However, after the officers refused to loosen her handcuffs when she said they were too tight and uncomfortable, respondent would have no reason to believe that telling the officers her handcuffs were painful would have caused them to loosen them.

Based on these facts, it was reasonable for the jury[5], the district court, and the Ninth Circuit to conclude that respondent's detention was unlawful. These facts establish that respondent's detention was anything but routine. Respondent's detention is also a far cry from that of the detention in *Summers*, where the respondent was not handcuffed, not made sit in a cold and damp garage for two to three hours, and was not detained after the search was concluded. Petitioners exclude the facts which are most favorable to the jury verdict when arguing that the rulings below are an expansion of *Summers*. When the facts they exclude are considered, it is readily apparent that no expansion of any sort has taken place here.

Indeed, petitioners cannot point to any error of law made by Ninth Circuit in *Mena II* when concluding there was a constitutional violation, and essentially just complain about the result. This Court should not grant certiorari merely to reexamine facts that the jury, the district court, and the Ninth Circuit have already considered and determined are sufficient to support a finding that respondent's detention was unreasonable.

The Ninth Circuit also correctly decided that the unlawfulness of the officers' conduct was clearly established at the time of the detention. In *Hope v. Pelzer*, 538 U.S. 730 (2002), this Court stated that qualified immunity is unavailable if the legal landscape at the time of the detention provided

[5]Indeed, Petitioners do not raise in this petition the issue of whether the district court erred when instructing the jury on what constitutes an unlawful detention and have therefore conceded that the instruction was correct. This further demonstrates the reasonableness of the jury's conclusion that the detention was unlawful given they were properly instructed on what constitutes an unlawful detention.

reasonable officers with fair warning that their conduct was unconstitutional. *Id.* at 739-740. Moreover, this Court further held in *Pelzer* that an official action is not protected by qualified immunity just because the very action in question had not been previously held unlawful. *Id.*

In this case, existing case law clearly supported the jury verdict and the district court's and Ninth Circuit's qualified immunity analysis. Petitioners dispute the conclusion that the unlawfulness of respondent's detention was clearly established by arguing that no reasonable officer in 1998 would have known that pointing a gun at respondent and handcuffing her for two to three hours during a *Summers* detention was unlawful. This argument lacks merit, however, because the officers' conduct was not limited to pointing a gun at respondent and handcuffing her, but involved other conduct clearly making this detention unreasonable. Indeed, even though respondent was not a suspect and there was no evidence that she was affiliated with any gang or had committed any crime, she was still handled roughly, made to march through the rain in bare feet, and made to sit in a cold and damp environment for hours in overly tight handcuffs. *See Franklin v. Foxworth*, 31 F.3d 873, 876-877 (9th Cir. 1994) (lawfulness of police detention of a non-suspect during search rests on evaluation of *Graham* factors; the fact that the police had no reason to believe that the detainee had committed a crime, was armed, was a gang member, posed any danger to them, or presented a risk of flight rendered the detention unreasonable and precluded qualified immunity).

Moreover, respondent's continued detention in handcuffs after the conclusion of the search was clearly established as being unlawful at the time it occurred. As stated in *Summers*, the initial authority to detain a non-suspect only

exists during the execution of a proper search. 452 U.S. at 705. This establishes that the Ninth Circuit's decision on qualified immunity was correct and consistent with this Court's rulings. All of the facts and circumstances of this case support the jury's verdict and the denial of qualified immunity.

C. The Ninth Circuit's Ruling Is Not in Conflict With Other Courts of Appeal Decisions Regarding the Application of *Michigan v. Summers*.

Petitioners' strained attempt to manufacture a conflict between the Ninth Circuit and other courts of appeal regarding the application of *Michigan v. Summers* is unavailing. The Ninth Circuit's decision in *Mena II* does not conflict with the rulings made by other courts of appeal. Like the Ninth Circuit opinion, each of the cases cited in petitioners' writ (*See Pet. Writ. 16-18)* recognize that *Summers* only granted law enforcement officials limited authority to detain occupants during the search of the premises pursuant to a valid search warrant and that prolonged or unduly intrusive detentions may violate the Fourth Amendment. Further, each of the cases petitioners identify also employ a totality of the circumstances test to determine the reasonableness of the detention. The fact that in some of the cases the courts found there was no Fourth Amendment violation in no way means that these decisions conflict with the Ninth Circuit's application of *Summers* in this case. On the contrary, what accounts for the different results is that the other cases were decided in the context of different facts and circumstances.

Indeed, this case is readily distinguishable from the two cases that petitioners argue clearly contradict the Ninth

Circuit's decision in *Mena II*. In *Pikel v. Garrett*, 55 Fed. Appx. 29 (3rd Cir. 2002), an unpublished decision, many of the employees who were detained and handcuffed for three and a half hours had criminal records. *Id.* at 31. One employee was found to have been carrying a gun at the time of her detention. The search also took place in an auto body shop where many of the tools in the shop could have been used as weapons. Pikel was pushed to the ground and had a gun pointed at his face because he failed to comply with the officers' orders to "get down." *Id.* It was on the basis of these very different facts that the *Pikel* court concluded that the plaintiffs' detention was reasonable.

This differs significantly from this case where there was no evidence that respondent had a criminal background, there were no weapons found on her when she was detained, and she was compliant at all times with the officers' commands. The employees in *Pikel* were also not held in handcuffs and detained after the search completed.

In *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993), handcuffing the occupants and forcing them to lay face down during the search was justified by several circumstances not present in this case. First, during a prior search of Fountain's home, Fountain was observed destroying contraband and automatic handguns were also seized from his home. *Id.* at 659. Moreover, during the search, narcotics were found in Fountain's pocket and three firearms were found in the hall closet. *Id.* at 660. The *Fountain* court ruled that in light of these circumstances, the actions of the law enforcement officials were reasonable and proportional to their interests in preventing flight and minimizing the risk of harm to the officers. *Id.* at 663. Nothing even remotely approaching these circumstances was present in this case.

Petitioners are also incorrect in their assessment that this case is less egregious than the cases they identify in their petition (*See Pet Writ.* at 17-18) where a Fourth Amendment violation was found by the court. Indeed, petitioners' argument in this regard is premised on the false notion that this is simply a handcuffing case and that the Ninth Circuit's ruling was that handcuffing a suspect for two-three hours during a search is a per se constitutional violation. As shown above, this was not the court's ruling. In fact, this case is just as egregious if not more egregious than the cases they cite in that, in addition to the facts described above, respondent was detained after the search had been completed, which did not occur in any of the other cases. Further, in *Pecsi v. Doyle*, 940 F.2d 661(6th Cir. 1991) 19 WL 137957 at 1-3, an unpublished opinion cited by petitioners, the detainee was not even handcuffed and was permitted to move around his apartment if accompanied by an officer. Nonetheless, the court found there was a Fourth Amendment violation with respect to the manner of Pecsi's detention.

As for the Ninth Circuit case *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), petitioners' summary of the case is misleading. Plaintiff Meredith made two unlawful detention claims. The first was based solely on her being handcuffed and detained in handcuffs during the search. *Id.* at 1062. As to this claim, the court determined that under the totality of the circumstances Meredith's detention in handcuffs was not justified. *Id.* At 1062-1063. However, the court found that the officers were entitled to qualified immunity on this claim because it had not been clearly established that handcuffing a person and detaining her in handcuffs under the circumstances the officers faced in *Meredith, standing alone,* would violate

the Fourth Amendment.[6] This ruling is not inconsistent with the holding in *Mena II* because the court's ruling that petitioners were not entitled to qualified immunity was not limited to the act of handcuffing as it was in *Meredith*, but was based on the totality of the officers' conduct during the seizure as described above. *Id.* at 1266-1267.

As to Meredith's second unlawful detention claim, this was based on her being kept in overly tight handcuffs. The court found that this fact rendered her detention unreasonable and that the officers were *not* entitled to qualified immunity. *Id.* at 1063-1064. Since respondent was also kept in overly tight handcuffs throughout her detention, this case is fully consistent with *Meredith*, contrary to petitioners' assertion.

Thus, not only is there no conflict between *Mena II* and the decisions of other courts of appeal with respect to the application of *Summers*, there is also no intra-circuit conflict in the Ninth Circuit. This case therefore does present this Court with an opportunity to resolve any conflict whatsoever, as the Ninth Circuit and the other courts of appeal have employed the same principles in their application of *Summers*.

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[6]The opinion states that it had not been established by July 10, 1998 in other circuits that simply handcuffing a person and detaining her in handcuffs would violate the Fourth Amendment. *Id.* at 1063. However, this is clear error because the case *Meredith* cites to for this proposition, *Heitschmidt v. City of Houston*, 161 F.3d 834, 838-839 (5th Cir. 1998) found that there was no qualified immunity for a detention involving handcuffing that occurred in *1994*.

II. This Is an Inappropriate Vehicle to Decide the Issue of Whether Mere Questioning of an Already Lawfully Detained Person Constitutes an Additional, Unreasonable Seizure in Violation of the Fourth Amendment.

A. To the Extent the Ninth Circuit Opinion Addresses the Issue of Whether Mere Questioning Can Constitute a Separate Constitutional Violation, it Is Dictum.

Petitioners argue that this is an appropriate case for this Court to decide the issue whether "mere questioning of an individual who has been lawfully seized can constitute an additional, unreasonable seizure." *Pet. Writ* at 9. In making this argument, petitioners focus heavily on the portion of the Ninth Circuit opinion concerning respondent being questioned by the officers about her immigration status. However, petitioners do not dispute that the Ninth Circuit found respondent's seizure to be unlawful even in the absence of her being questioned about her immigration status. Thus, any discussion of whether this questioning was itself a constitutional violation is dictum. Moreover, petitioners also concede that the parties never briefed the issue of whether mere questioning constitutes a separate constitutional violation to the court or presented it to the jury.[7] Thus, to the extent any portion of the Ninth Circuit's opinion touches upon this specific issue, it is dictum as well.

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[7]Respondent merely argued to the jury and the courts below that the act of her being questioned about her immigration status was one of many factors that rendered her detention unconstitutional.

Further, resolving this issue would have no impact on the outcome of this case unless this Court also found that all of the facts regarding respondent's detention were insufficient to establish a Fourth Amendment violation. However, respondent has already demonstrated that the Ninth Circuit's decision regarding the unlawfulness of her detention was correct when all the facts and circumstances of her detention are taken into account. Therefore, granting review as to issue number one of petitioners' writ would be inappropriate because the questioning issue is unnecessary to the holding in this case and would be tantamount to an advisory opinion.

B. The Ninth Circuit Did Not Hold That the Officers' Questions About Respondent's Immigration Status Constituted a Separate, Additional and Unconstitutional Seizure.

Petitioners misconstrue the holding in *Mena II* when arguing that the Ninth Circuit held that the officers' questions to respondent about her immigration status constituted a separate, additional and unconstitutional seizure. At no point in the opinion does the Ninth Circuit state that the questioning amounted to a separate, unconstitutional seizure. The Ninth Circuit's analysis was focused on whether there were sufficient facts to sustain the jury's verdict that respondent's detention was unreasonable. In this context, the Ninth Circuit found that questioning Mena about her immigration status and searching her purse were among many factors that rendered her detention unreasonable.[8] The court did not rule that her questioning

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[8]Indeed, the fact that the Ninth's Circuit's holding was also based on the fact the officers searched respondent's purse for proof of citizenship is another reason why this case is not appropriate to decide issue number one of the writ.

amounted to a separate, constitutional violation, nor could it without that portion of the opinion being dictum, considering respondent never argued this below or briefed this issue to the Ninth Circuit. 332 F.3d at 1264-1266.

Since the Ninth Circuit never ruled that the officers' questions regarding respondent's immigration status amounted to a separate, unconstitutional seizure, and considering respondent never advanced this argument at trial or on appeal, this obviously would be an inappropriate case to decide the issue of whether mere questioning of an already lawfully detained person could constitute a separate, unconstitutional seizure. Moreover, the fact that the Ninth Circuit did not find that there was a separate, unconstitutional seizure means that there is no conflict with the Seventh Circuit case *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002), as petitioners argue. Indeed, *Martinez-Camargo* specifically held that an officers' questions about the detainee's immigration status could be considered in determining the reasonableness of the initial detention even though they did not create a separate seizure. 282 F.3d at 487. This alone is grounds to deny certiorari as to issue number one of petitioners' writ.

C. This Is Not an Appropriate Case to Resolve the Circuit Conflict Petitioners Identify.

Petitioners argue that this is an appropriate case to resolve the conflict between the court of appeals on the issue of whether an officer must have a reasonable suspicion to question a lawfully detained individual on matters unrelated to the reason for the initial detention when the questioning does not expand the length of detention. However, even a cursory examination of the cases cited in petitioners' writ (*Pet Writ* at

10-11) reveals that the legal and factual background of those cases is markedly different from this one, thus making this an inappropriate case to resolve the conflict petitioners identify. Indeed, petitioners are only able to create a conflict by ignoring the context of the cases they cite, including the facts of this case.

The majority of the cases cited by petitioners involve questioning by law enforcement officers about other possible crimes during routine traffic stops and fall under *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. *See United States v. Holt*, 264 F.3d 1215, 1218-1219 (10th Cir. 2001), *United States v. Pruitt*, 174 F.3d 1215, 1217-1219 (11th Cir. 1999), *United States v. Ramos*, 42 F.3d 1160, 1161-1163 (8th Cir. 1994), *United States v. Murillo*, 255 F.3d 1169, 1172-1173 (9th Cir. 2001); *United States v. Jones*, 44 F.3d 860, 871 (10th Cir. 1995); *United States v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993); *United States v. Crain*, 33 F.3d 480, 481-482, 485 (5th Cir. 1994); *United States v. Shabazz*, 993 F.3d 431, 434-435 (5th Cir. 1993). The case *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) is also a traffic stop case, although it rejects employing a *Terry* analysis in favor of a probable cause arrest analysis. *Id.* at 952-953.

United States v. Chacon, 330 F.3d 323, 325, 327 (5th Cir. 2003) and *United States v. Muchaca-Barrera*, 261 F.3d 425, 429, 431 (5th Cir. 2001) are border detention/ checkpoint cases which fall under the *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), line of cases. Finally, *United States v. Martinez-Camargo*, 282 F.3d 487, 489-490 (2002) is an investigatory stop/ immigration detention case.

By contrast, this case concerns the detention of a non-suspect resident during a search of the premises pursuant to a

valid search warrant. This case falls within the ambit of *Michigan v. Summers*. As such, this is an inappropriate case to decide the permissible scope of questions a law enforcement officer may ask during a traffic stop, a border/checkpoint detention, or an investigatory stop/immigration detention. This is because whether or not an officer's questioning renders a detention unreasonable turns on the facts and circumstances unique to each of these settings. The fact that all of the cases involve questioning does not overcome the fact that law enforcement officials are confronted with different concerns depending on the context they may find themselves in. Therefore, having this case set the parameters of permissible questioning in other, dissimilar law enforcement settings will do little to clarify what constitutes permissible or impermissible questioning and will likely lead to additional confusion. Accordingly, this case is not an appropriate vehicle to resolve the circuit conflict petitioners identify.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 13, 2004

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No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,
Petitioners,

v.

IRIS MENA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

As petitioners have demonstrated, this case presents two recurring constitutional questions that are ripe for this court's review: whether the questioning of a lawfully detained individual can violate the Fourth Amendment; and whether the "unusual case" exception to *Michigan* v. *Summers*, 452 U.S. 692 (1981), extends to the detention of occupants in handcuffs during the execution of a search warrant for weapons. Unable to refute that showing, respondent resorts to fundamental mischaracterizations of the factual bases and actual legal holdings of the Ninth Circuit's decision in this case. These revisionist efforts, however, cannot obscure the clear conflicts that the decision below creates or further deepens on each of the questions presented by the petition.

1. Respondent does not, and indeed cannot, deny that there is a clear and irreconcilable split of authority among the courts of appeal on whether questions asked of lawfully detained individuals can constitute an additional, unreasonable seizure under the Fourth Amendment. See Pet. 10-12 (identifying circuit court cases). Instead, she argues only that this case is an "inappropriate vehicle" for review of the undisputed conflict, claiming that the Ninth Circuit's resolution of this issue was dictum, that the Ninth Circuit only treated questioning as a "factor" affecting the reasonableness of the detention, and that this case is factually different from the multiple other circuit court decisions on this issue. Opp. 20-24. These claims are completely baseless.

The Ninth Circuit's conclusion that petitioners violated respondent's Fourth Amendment rights by questioning her about her immigration status was an independent alternative *holding*—not dictum. After the court concluded that detaining Mena for several hours in handcuffs was a violation of the Fourth Amendment, it went on to hold that the questioning "*alone*" was "a violation of a constitutional

right." Pet. App. 10a (emphasis added). Later the court reaffirmed that questioning Mena was an independent Fourth Amendment violation. See *id.* at 14a ("*[J]ust on these facts alone*, . . . Mena alleges a Fourth Amendment violation") (emphasis added). Indeed, the court gave "particular emphasis" to its holding that the questioning violated the Fourth Amendment. *Id.* at 10a.[1]

Alternative holdings are not dicta. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); see also *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case *obiter dictum* that it is only one of two reasons given for the same conclusion."). The holding that the questioning violated the Fourth Amendment was "an independent, alternative basis for the decision of the court below, no more dicta than its companion holding." *United States Steel Corp.* v. *United States EPA*, 444 U.S. 1035, 1038 (1980) (Rehnquist, J., dissenting from denial of cert.). The alternative holding on questioning is binding precedent throughout the nine states

[1] Respondent's argument that the Ninth Circuit's decision on this issue was based in part upon the allegedly illegal search of respondent's purse is a red herring. Although the court noted in passing that the search of respondent's purse required reasonable suspicion, *see* Pet. App. 14a, its holding was "that the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status," *id.* at 10a, as the other judges on the en banc panel clearly understood. *See id.* at 25a-26a (Kleinfeld, J. dissenting) (describing the holding as "the extraordinary new proposition of law that it is unconstitutional to ask a person detained for other reasons about her citizenship, without reasonable suspicion"); *id.* at 33a (Gould, J., dissenting) (objecting to the panel's holding "that the Constitution is offended by police officers asking Ms. Mena a question about her citizenship"). Moreover, the officers were plainly authorized by the search warrant to search respondent's purse; the purse was on the premises, and among the items targeted by the search warrant were "[i]tems of personal property tending to establish the identity of person(s) in control of said premises." *See* Appellant's Excerpts of R. 255.

encompassed by the Ninth Circuit. See *Best Life Assurance Co.* v. *Commissioner*, 281 F.3d 828, 833-34 (9th Cir. 2002) (alternative holdings are binding precedent). As such, it is plainly appropriate for this Court's review.[2]

Nor is there the slightest merit to respondent's revisionist claims that the Ninth Circuit simply deemed respondent's questioning one of "many factors that rendered her detention unreasonable," and that it did not hold that questioning alone constituted a separate Fourth Amendment violation. Opp. 21-22. In fact, the Ninth Circuit held with "particular emphasis" that the questioning "alone" was a violation of the Fourth Amendment. Pet. App. 10a. The multifactor analysis that respondent posits simply does not appear in the Ninth Circuit's decision.

Finally, the fact that there are many different situations in which lawfully detained individuals have been questioned, Opp. 23, is a factor that *favors*, rather than militates against, review of this issue. Because it arises in contexts as divergent as traffic stops, immigration inspections, and *Summers* detentions, the issue of whether lawfully detained persons can be asked questions that are not founded upon probable cause or reasonable suspicion is a significant and recurring constitutional question with profound implications for a wide range of police activities. Contrary to respondent's claim, however, this fundamental legal question is not one that "turns on the facts and circumstances unique to each of these settings," Opp. 24; whether law enforcement officers are as free to ask questions of lawfully detained individuals as they are to ask questions of individuals on the street is a pure

[2] The fact that the Ninth Circuit panel reached out to decide an issue that had not been fully addressed by the parties, Opp. 22, in no way undermines this conclusion. This Court reviews "'issue[s] not pressed so long as [they have] been passed upon.'" *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The Ninth Circuit undoubtedly "passed upon" the issue of whether the questioning of a lawfully detained individual can violate the Fourth Amendment.

question of constitutional law. Cf. *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); *INS* v. *Delgado*, 466 U.S. 210, 218 (1984). Seven federal circuits have now ruled on this recurring legal issue. See, *e.g.*, *United States* v. *Chacon*, 330 F.3d 323, 328-29 (5th Cir. 2003); *Martinez-Camargo* v. *INS*, 282 F.3d 487, 493 (7th Cir. 2002); *United States* v. *Childs*, 277 F.3d 947, 949-50 (7th Cir.) (en banc), *cert. denied*, 537 U.S. 829 (2002); *United States* v. *Holt*, 264 F.3d 1215, 1229 (10th Cir. 2001) (en banc) (per curiam); *United States* v. *Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999); *United States* v. *Jacobs*, 173 F.3d 426 (4th Cir. 1999) (table) (per curiam), *available at* 1999 WL 96121, at *2; *United States* v. *Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994). The Fourth, Fifth, and Seventh Circuits have ruled that questions alone cannot violate the Fourth Amendment; the Eighth, Ninth, Tenth, and Eleventh Circuits have held that they can. It is time for this Court to settle this conflict by granting the petition for certiorari.

2. This case also presents the opportunity for this Court to reconcile the courts of appeals' divergent interpretations of the scope of the "unusual case" exception to *Michigan* v. *Summers*, 452 U.S. 692 (1981). Respondents attempt to obscure the Ninth Circuit's clear break with the interpretations of other courts by exaggerating and, in some instances, completely misstating the factual basis of the Ninth Circuit's conclusion that this was an "unusual case." A review of the facts that the Ninth Circuit actually relied upon to support that conclusion, however, illustrates both the nature of respondent's distortions and, more importantly, the degree to which the Ninth Circuit's drastic expansion of the "unusual case" exception differs from the interpretations of other courts and from the spirit of *Summers*.

The Ninth Circuit clearly identified the facts that, in its view, rendered Mena's detention constitutionally unreasonable: "pointing a machine gun at Mena's face, roughly jerking her off of her bed, marching her barefoot through the rain into a cold garage, and keeping her in handcuffs for several hours." Pet. App. 9a-10a. The additional "facts" posited by respondent appear nowhere in the Ninth Circuit's opinion or in the record itself. The court never found that Mena's handcuffs were "overly tight," as respondent claims throughout her opposition.[3] Opp. 15, 19; see *id.* at 13 & n.4. The court also never suggested that Mena was handcuffed for any period of time after the search concluded. See *id.* at 7, 8, 13, 15, 17, 18.

Instead, in concluding that respondent's detention violated the Fourth Amendment, the Ninth Circuit repeatedly stressed that she was handcuffed at gunpoint and held in handcuffs for two to three hours. See Pet. App. 3a (officers, "pointing a submachine gun at her head, turned [Mena] onto her stomach and handcuffed her"); *id.* ("Although she was absolutely compliant, the officers detained Mena in handcuffs for two to three hours"); *id.* at 9a ("the officers handcuffed Mena and kept her in handcuffs for two to three hours"); *id.* (officers "us[ed] handcuffs for an extended period"); *id.* at 10a (officers "ke[pt] her in handcuffs for several hours"). These are the central facts that governed the lower court's constitutional analysis, and that will govern future determinations throughout the Ninth Circuit. It was these facts that prompted Judge Kleinfeld in his dissent from the denial of rehearing en banc to opine: "[i]f the footnote in *Summers* can be extended to this case, the holding of *Summers* is deprived of any force." *Id.* at 32a. Accordingly, even if the additional facts respondent cites place the detention in this case "close" to the constitutional line (*id.* at 33a (Gould, J., dissenting)), that would only make this case a better vehicle for deciding the scope of *Summers*. It would not provide a reason to deny the petition.

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[3] Although she testified that being handcuffed was "uncomfortable," respondent never claimed that the handcuffs were too tight and in fact testified that she did not remember asking the officers to loosen them. *See* Appellant's Excerpts of R. 119, 163.

The Ninth Circuit's determination that the "unusual case" exception to *Summers* applies when the occupant of lawfully searched premises is handcuffed at gunpoint and remains in handcuffs for the duration of a two to three hour search is diametrically opposed to the Third, Sixth, and Tenth Circuits' interpretation of the "unusual case" exception. See *Wright* v. *City of St. Francis, Kan.*, No. 02-3337, 2004 WL 838181, at *7-*8 (10th Cir. Apr. 20, 2004); *Pikel* v. *Garrett*, 55 Fed. Appx. 29, 32 (3d Cir. 2002); *United States* v. *Fountain*, 2 F.3d 656, 661-63 (6th Cir. 1993). The *Wright*, *Pikel*, and *Fountain* courts each recognized that handcuffing occupants during the execution of a search warrant in potentially dangerous circumstances is not an "unusual case" under *Summers*.

In *Wright*, a case decided by the Tenth Circuit after the filing of the petition in this case, state tax agents investigating misdemeanor tax violations handcuffed the occupants of a residence for four hours during the execution of a search warrant. 2004 WL 838181, at *2. As in the present case, the tax agents held the occupants at gunpoint while handcuffing them and kept them in handcuffs for the duration of the search. See *id.* As justification for the search, the tax agents claimed that they had been warned that occupants had a history of violence and possessed firearms; however, during the search the agents found no firearms save a broken BB gun. See *id.* at *2, *8. Nevertheless, in light of the warning the agents had received before executing the warrant, the Tenth Circuit held that the agents acted reasonably by using handcuffs to detain occupants for the duration of the search. See *id.* at *8.

The Tenth Circuit's refusal to apply the "unusual case" exception to *Wright* embodies a vastly different understanding of that exception than the one adopted by the Ninth Circuit in this case. The plaintiffs in *Wright* were detained in handcuffs for four hours, much longer than the detention in this case. See *id.* at *2. Moreover, the attempted

murder charges that were being investigated here are far more serious than the misdemeanor tax violations that were being investigated in *Wright*, and thus the risk petitioners faced that occupants might flee, resist the search violently, or destroy evidence was far more serious. See *Summers*, 452 U.S. at 705.

Similarly, in *Pikel* the Third Circuit held that officers acted reasonably when they handcuffed employees of an automobile body shop for three and a half hours during the execution of a search warrant. 55 Fed. Appx. at 32. The detention was more intrusive than that in the present case.[4] Not only was the *Pikel* detention longer than the detention of respondent by as much as an hour and a half, it was also in a public workplace rather than in a private home. See *id.* Nevertheless, the Third Circuit recognized that the "unusual case" exception should not apply. *Id.*; see also *Fountain*, 2 F.3d at 663 (holding that handcuffing occupants and forcing them to lie face down on the floor was reasonable).[5]

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[4] Respondent's assertion that the officers in *Pikel* faced a risk of harm greater than that confronted by petitioners is without merit. Petitioners were searching for a firearm used in an attempted murder. They were in the residence of a gang member who had been implicated in at least two shootings. *See* Pet. 3-4; Appellant's Excerpts of R. 259-60. During the course of their search the officers found a gun and several baseball bats with the gang's insignia. *See* Pet. 6; Appellant's Excerpts of R. 95-96. The fact that one of the employees in *Pikel* was carrying a gun does not distinguish *Pikel*; the officers handcuffed all the employees, not only the one with a gun.

[5] Respondent's claim that the detention in *Fountain* was justified because firearms and drugs were found during the search puts the cart before the horse. The question is whether officers had reason to place occupants in handcuffs based on the information available at the time. When petitioners executed the search warrant, they knew that they were searching for a weapon used in a driveby shooting at a location that was a possible gang safe-house. Under those circumstances, handcuffing the multiple occupants during the duration of the search was more than reasonable.

The Ninth Circuit has expanded the "unusual case" exception of *Summers* far beyond the interpretations of these three circuits. Indeed, another Ninth Circuit panel has recognized that at the time respondent was detained "it was not clearly established in this (or any other) circuit that simply handcuffing a person and detaining her in handcuffs during a search for evidence would violate her Fourth Amendment rights." *Meredith* v. *Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003). Moreover, the Ninth Circuit's decision significantly impedes the ability of law enforcement officers to execute search warrants safely. Depriving officers of authority to secure all occupants at a location where the officers reasonably expect to find guns and violent gang members exposes officers needlessly to danger. See Brief of *Amicus Curiae* Police Officers Research Association of California Legal Defense Fund and Affiliates in Support of Petition for Writ of Certiorari 10-11; Brief of *Amicus Curiae* League of California Cities Supporting Grant of Certiorari 2. This Court should resolve the conflict between the Ninth Circuit and the Third, Sixth, and Tenth Circuits and should grant the petition for certiorari.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF *AMICUS CURIAE*

The League of California Cities is an association of all 478 California cities. The League is united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys representing all 16 divisions of the League from all parts of the State. The committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance.

The League therefore has a direct interest in precedent-setting appellate decisions that may unjustifiably increase the risks of civil liability for municipal officials, while simultaneously deterring proper and effective law enforcement investigatory and safety practices, all to the detriment of the general welfare and the public safety. The decision of the Court of Appeals in this case constitutes such a precedent.*

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling that mere questioning by law enforcement officers constitutes a Fourth Amendment activity that must be independently justified is at odds with controlling precedent from this Court, other circuits,

* No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. The Respondents and the Petitioners have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

and the highest court of the State. If the Ninth Circuit's rule were permitted to stand, officials throughout its vast jurisdiction would be unreasonably and unjustifiably restricted in their abilities to engage in questioning necessary to secure the public safety and order against threats from all manner of criminal and terrorist activities.

In reaching its erroneous conclusion that the detention in this case was unreasonable, the Ninth Circuit confused discrete Fourth Amendment concepts, thereby deciding an important issue of constitutional law in conflict with relevant decisions of this Court as to the proper interpretation of the Constitution. The service of residential search warrants – which is already a high-risk activity – is made riskier for officers and residents alike under the Ninth Circuit's unwarranted departure from this Court's direction.

ARGUMENT

Under this Court's rules, certiorari may be granted when the decision of one United States court of appeals on an important legal issue conflicts with the decision of another, or with a decision of a state court of last resort (Rule 10(a)), or when the appellate decision conflicts with relevant decisions of this Court (Rule 10(c)). On all three grounds, and as to both questions presented, this is such a case.

***Question presented*: Whether law enforcement *questioning* during a detention is a separate Fourth Amendment "seizure."**

1. The decision of the Ninth Circuit directly conflicts with decisions of other circuits.

The Ninth Circuit said that the act of "inquiring unnecessarily" into Mena's immigration status while she was detained by officers during execution of a search warrant constituted "a violation of a constitutional right." *Mena v. City of Simi Valley*, 332 F.3d 1255, 1264 (9th Cir. 2003). In the Ninth Circuit's view, "the officer violated Mena's Fourth Amendment rights by questioning her citizenship status." *Id.*, at 1266, n.15. At least five times in its decision, the Ninth Circuit said that questioning during a detention is itself a form of Fourth Amendment "seizure" for which separate reasonable suspicion is required. This view is directly contrary to the rulings of at least two other circuits.

The Fifth Circuit, for example, has said that "we reject any notion that a police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation." *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993).

The Seventh Circuit has likewise held that "questions asked of persons involved in [temporary detentions] are not 'seizures' and thus do not require probable cause or reasonable suspicion." *United States v. Childs*, 277 F.3d 947, 951 (7th Cir.) (en banc), *cert. denied*, 537 U.S. 829 (2002).

The Seventh Circuit applied that rule in rejecting the argument that questioning a detainee about his citizenship violates the Fourth Amendment: "Questions, however,

are neither searches nor seizures, so . . . they did not constitute a seizure independent and distinct from the original investigatory stop." *Martinez Camargo v. I.N.S.*, 282 F.3d 487, 493 (7th Cir. 2002). (Citation omitted.)

2. The decision of the Ninth Circuit conflicts with decisions of the state court of last resort.

Regularly confronting the contention that a detention has occurred when police officers question a person about possible illegality, the California Supreme Court has said that "No Fourth Amendment privacy interests are invaded when an officer seeks a consensual interview with a suspect," *People v. Coddington*, 23 Cal.4th 529, 581, 2 P.3d 1081, 97 Cal.Rptr.2d 528 (2000), and that no antecedent suspicion was required, because no seizure occurred, where an officer "posed basic and preliminary questions to establish whether defendant might possess information concerning the crime." *People v. Hughes*, 27 Cal.4th 287, 328, 39 P.3d 432, 116 Cal.Rptr.2d 401 (2002).

3. The decision of the Ninth Circuit conflicts with relevant decisions of this Court.

For the immunity-defeating proposition that it has "long been the law" that police questioning requires particularized suspicion, the Ninth Circuit repeatedly cited this Court's opinion in *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). *See*, *Mena*, 332 F.2d at 1264-1267.

Neither *Brignoni-Ponce* nor any other decision of this Court has ever held or even *suggested* that separate justification is required before an officer may ask questions during a detention. As the opening sentence of

Brignoni-Ponce made clear, that opinion instead concerned the level of suspicion required *to make a vehicle stop*: "This case raises questions as to the United States Border Patrol's authority to *stop automobiles* in areas near the Mexican border." *Brignoni-Ponce*, 422 U.S. at 874. (Emphasis added.)

This Court's several decisions distinguishing consensual encounters from detentions teach that suspicionless questioning, including requests for identification and for consent to search, does not engage Fourth Amendment protections. *United States v. Mendenhall*, 446 U.S. 544, 555, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Florida v. Royer*, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); *Florida v. Rodriguez*, 469 U.S. 1, 5-6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984); *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991); and *United States v. Drayton*, 536 U.S. 194, 200-201, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002).

In this context, the Court has said, "[W]e have held repeatedly that mere police questioning does not constitute a seizure." *Bostick*, 501 U.S. at 434. Therefore, "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search. . . ." *Drayton*, 536 U.S. at 201. If questioning does not constitute a "seizure" of the person during the course of a consensual encounter, there is no reason to conclude that it nevertheless constitutes a separate "seizure" during the course of a lawful detention.

This Court's ruling in *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) is instructive. In

that case, Robinette had been lawfully stopped for highway speeding; after issuing a warning and returning the driver's license, the officer asked Robinette whether he was carrying any contraband in the car, whether he had any weapons or drugs, and whether the officer could search the car.

The Ohio court had ruled that because such questioning was "not related to the purpose of the original, constitutional stop," the resulting consent was invalid, requiring suppression of evidence. *Id.*, at 37-38. This Court reversed that ruling and found that the consent to search was not invalid, thereby indicating that questioning following a lawful detention requires no justifying suspicion. Again, if post-detention questioning does not constitute a "seizure" requiring separate suspicion, there is no reason to conclude that such questioning during a detention constitutes separate Fourth Amendment activity.

Thus, the Ninth Circuit's holding that questioning is a "seizure" requiring reasonable suspicion is at odds with the decisions of this Court, the state court of last resort, and the decisions of other circuits on this same issue.

The importance of the issue is great, for if officers cannot question those whom they lawfully detain, it would be difficult to obtain identification, to seek consent to search, or to obtain information to further legitimate investigations. The Ninth Circuit's rule requiring reasonable suspicion to justify investigative questioning "ignores the reality that police often are not yet aware of the exact sequence and scope of events they are investigating – indeed, that is why police must investigate in the first place. Deterred by the possibility of violating the [Fourth] Amendment, police likely would refrain from questioning

certain defendants altogether." *Texas v. Cobb*, 532 U.S. 162, 173-74, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001).

***Question presented*: Whether police unreasonably seize a detainee by initially pointing a firearm and subsequently handcuffing the detainee while a high-risk search warrant is served.**

1. The decision of the Ninth Circuit directly conflicts with decisions of other circuits.

In denying Muehler and Brill qualified immunity, the Ninth Circuit said that the allegations of Mena's complaint described a violation of a clearly-established right against being detained in an unreasonable manner. That court pointed to the allegations that officers on the entry team (not alleged to be either Muehler or Brill) pointed a gun at Mena when they first encountered her in bed, and kept her in handcuffs for two or three hours while the search was completed. These allegations, said the Court of Appeals, supported a conclusion that "her detention was objectively unreasonable. . . ." *Mena*, 332 F.3d at 1263. Other circuits, on similar facts, have come to the opposite conclusion.

For example, in *Washington v. Drug Enforcement Administration*, 183 F.3d 868 (8th Cir. 1999), police served a search warrant in a drug and murder investigation, breaking into the home of an elderly couple in the night with a battering ram, pointing guns at the couple, and using loud and threatening language to confine them at the kitchen table. The Eighth Circuit found that "The officers sought to gain immediate control of the situation, in order to protect themselves and the occupants, by drawing their weapons and using forceful language and

conduct," actions which were ruled reasonable under the circumstances. *Id.*, at 874.

In *Torres v. United States*, 200 F.3d 179 (3d Cir. 1999), officers serving a search warrant entered a house with a battering ram, initially pointed guns at a husband and wife, forced them to lie on the floor, and handcuffed them for one and one-half to three hours while the premises were searched for drugs. The Court of Appeals agreed that "The circumstances confronting the agents were such that they had reason to be concerned for their safety," overruling a claim of unreasonable detention. *Id.*, at 187.

In contrast, the Ninth Circuit ruled that officers serving a warrant in a gang-related drive-by-shooting case, where multiple padlocked doors impeded the search process (*Mena*, 332 F.3d at 1260), acted *un*reasonably in the similar precautions they took for safety and control. This ruling is manifestly inconsistent with the rulings of the Third and Seventh Circuits in the cases cited, and others.

2. The decision of the Ninth Circuit conflicts with decisions of the state court of last resort.

The California Supreme Court has said that anyone encountered at premises where a narcotics search warrant is being served presents such a risk of danger to the serving officers and others that it is not unreasonable for officers to exercise immediate and decisive control, including drawing and pointing a weapon, ordering the person to the ground, and handcuffing the person while the search is carried out. "They are steps a reasonably prudent officer could consider necessary to protect his own safety, that of the other searchers, and that of the detainee himself."

People v. Glass, 11 Cal.4th 354, 369, 909 P.2d 729, 45 Cal.Rptr.2d 425 (1995).

3. The decision of the Ninth Circuit conflicts with relevant decisions of this Court.

Mena's suit alleged, among other things, that "the officers detained her in an unreasonable manner." *Mena*, 332 F.3d at 1260. No reported allegations suggest any use of force against Mena by Muehler or Brill, or by any other officers. And yet, when considering the claim of detention in an unreasonable manner, the Ninth Circuit resorted to the test for *excessive force* under *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Said the Ninth Circuit, "To evaluate claims of unreasonable seizures and detentions . . . we apply the 'objective reasonableness' standard [from *Graham*] . . ." (*i.e.*, severity of crime, safety threats, active resistance or flight). Added by the Ninth Circuit to the list of "relevant" factors was an inquiry into whether the detention was unnecessarily painful, degrading, prolonged, or characterized by undue invasion of privacy. *Mena*, 332 F.3d at 1262.

This Ninth Circuit test is unworkably devoid of concrete guidance for police (what exactly does "degrading" mean, when is an invasion of privacy "undue," and why not simply analyze claims of unnecessary pain under the standard for excessive force?). Moreover, the Ninth Circuit's conflation of the three *Graham* excessive force factors with the four additional, ambiguous factors created by the Ninth Circuit does not faithfully apply the balancing test mandated by decisions of this Court for evaluating the reasonableness of *detentions*.

This Court did not hold, in *Graham* or elsewhere, that *all* Fourth Amendment reasonableness inquiries are to be decided by reference to the excessive force factors listed there. Rather, the nature of the particular Fourth Amendment claim must first be determined (unlawful detention? arrest? use of force? entry? search? property seizure?), and "The validity of the claim must then be judged by reference to the *specific* constitutional standard which governs *that* right, rather than to some generalized 'excessive force' standard." *Graham*, 490 U.S. at 394. (Emphases added.) Because the Ninth Circuit did not adhere to this approach, its decision is in conflict with this Court's specific instruction.

Instead of relying on the force-specific factors from *Graham* (as supplemented by its own four additional factors), the Ninth Circuit should have evaluated Mena's detention under the appropriate balancing test, under which would be "balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990).

Having considered the strong governmental interests in preventing the flight of suspects and the destruction or concealment of evidence, as well as protection of police and others against surprise attack, this Court has already determined that where a "neutral and detached magistrate had found probable cause to believe that the law was being violated in that house," the balance weighs in favor of detaining the occupants while the search is completed, except in unusual circumstances. *Michigan v. Summers*, 452 U.S. 692, 704-05, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). The Ninth Circuit's opinion that Mena's detention fell into the exceptional category is supported by no

compelling arguments or analogous authority to distinguish this case from the majority of search warrant executions occurring regularly, where similar restraints and precautions are routinely employed to deal with the recurring threats of flight, assault and destruction of evidence.

The detention of Iris Mena while officers looked for firearms and other shooting and gang-related evidence in a structure suspected of harboring the drive-by shooter, where the doors of multiple rooms were found to be padlocked, does not suggest an exceptional or unusual reason for dispensing with ordinary control and safety precautions. In such a case, officers act with necessary prudence in initially covering occupants with their weapons until being assured that no immediate threat exists, and in handcuffing adult occupants while the search is carried out, to prevent flight, destruction of the evidence, or surprise assault.

In this case, there is no evidence suggesting that the officers were aware, before completing their search and investigation, whether Mena might be associated with the gang, whether she had access to any weapons or evidence that might be secreted on the premises, or whether she might present a risk of deadly surprise during the search. This Court has properly noted the safety risks confronting officers in the unfamiliar territory of a private residence, which "puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." *Buie*, 494 U.S. at 333.

Given this Court's analysis in *Summers*, and in view of this Court's directives with respect to the proper analytical framework for evaluating Fourth Amendment reasonableness, the Ninth Circuit's ruling that Mena's detention violated the Fourth Amendment is in conflict with relevant decisions of this Court, on an important legal issue. Because the fear of civil liability for detaining and questioning those present during searches performed pursuant to judicial warrant will significantly and unjustifiably inhibit law enforcement officers in the performance of their duties under the Ninth Circuit's ruling, the 478 cities comprising the League of California Cities strongly believe this erroneous decision must be reversed.

CONCLUSION

Equating "questioning" to "seizing" would substantially curtail legitimate investigative options for law enforcement officers who stand between the victim and the criminal, and between the homeland and the terrorist. Forbidding firearms readiness and restraint by handcuffs during high-risk police operations would force officers to choose between safety and duty. "Certainly, it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Terry v. Ohio*, 392 U.S. 1, 23, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

As to both important questions presented, the Ninth Circuit's decision is in conflict with decisions of other circuits, the state's high court, and this Court. Also, it is unacceptably wrong. The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 03-1423

In The
Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; and BRIEF *AMICUS CURIAE* OF POLICE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND AND AFFILIATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION

The Police Officers Research Association of California Legal Defense Fund (Fund) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Joining in this request are the following member affiliates of the Fund: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations and Wyoming Highway Patrol Association. Also joining in this request are the following non-member affiliates of PORAC: National Association of Police Organizations, Sacramento County Deputy Sheriffs Association and Riverside Sheriffs' Association. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was not obtained.

The interest of the Fund and its affiliates arises because the limited questioning of detained persons and the use of handcuffs to secure detained persons while executing a warrant to search for drugs in a residence are common practices of peace officers served by the Fund. The Fund is an organization providing prepaid group legal services to peace officers for matters related to their employment. The Fund and its affiliates serve peace officers throughout the western United States including the states of Arizona, California, Colorado, Montana, Nevada, Oregon, Texas, Utah, Washington and Wyoming. Clear and consistent federal case law giving practical guidance to peace officers and their employers is necessary. Such guidance also serves to protect the safety of

peace officers, and to protect the interests of peace officers in fair and just employment-related discipline and potential civil liability.

In the instant case the Ninth Circuit Court of Appeals has rendered a decision that would substantially diminish the capacity of law enforcement officers to apply clear and workable rules under routine circumstances encountered during the execution of search warrants for contraband. The instant case would also substantially reduce the latitude law enforcement officers must have when determining the reasonableness of keeping a detained person handcuffed. It is believed that the brief *amicus curiae* will demonstrate the need for review of this case to ensure federal case law maintains the practical guidance and fair warning peace officers need to do their jobs lawfully. The analysis employed by the Ninth Circuit in this case departs from the guidance provided by the U.S. Supreme Court in the case of *Michigan v. Summers,* 452 U.S. 692 (1981), and demonstrates a developing split among the circuit courts concerning the proper use of handcuffs and the proper questioning of persons detained while executing a search warrant. The U.S. Supreme Court should reconcile this split in order to reestablish its guidance in *Summers*.

Respectfully submitted,

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STATEMENT OF INTEREST

Amicus Curiae represents the Police Officers Research Association of California Legal Defense Fund (Fund), its member affiliates: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations and Wyoming Highway Patrol Association; and its non-member affiliates: National Association of Police Organizations, Sacramento County Deputy Sheriffs Association and Riverside Sheriffs' Association. The Fund is an organization providing prepaid group legal services to peace officers and public safety employees for matters related to their employment.[1] The Fund provides services to peace officers and public safety employees throughout the western United States including the states of Arizona, California, Colorado, Montana, Nevada, Oregon, Texas, Utah, Washington and Wyoming. The Fund employs a panel of attorneys, such as Garrettson, Goldberg, Fenrich & Makler, P.C., which represents over 90 law enforcement unions throughout the states of Oregon and Washington.

Petitioners have consented to filing this brief. Respondent has not consented to filing this brief.

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[1] Counsel for a party did not author any part of this brief. The PORAC Legal Defense Fund made the entire and sole monetary contribution to preparation and submission of this brief.

The Fund supports the Petition for Writ of Certiorari. The decision in *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003) and the order denying rehearing en banc published at 354 F.3d 1015 (9th Cir. 2004) raise uncertainty concerning the conditions of detention of occupants during the execution of a warrant to search for contraband in routine circumstances. This decision will adversely affect the safety, the personal liability and employment relations of the members represented by the Fund and its affiliates.

SUMMARY OF ARGUMENT

Peace Officers have a strong interest in maintaining clear and consistent guidelines on the use of handcuffs on and the questioning of detained persons during execution of a search warrant in circumstances similar to those faced by Officers Muehler and Brill in *Mena*. It is not an uncommon practice for peace officers while executing a warrant to search for contraband in a residential building to secure the occupants, to handcuff them, to hold them in a central location during the search, and to question them. The Ninth Circuit decision in *Mena,* by treating handcuffing as an unusual case, departs from the guidance of the U.S. Supreme Court in *Michigan v. Summers,* 452 U.S. 692 (1981), substantially diminishes the capacity of law enforcement officers to apply clear and workable rules from the *Summers* decision in routine circumstances, and diminishes the latitude law enforcement officers need to make reasonable decisions on detention conditions. As Professor Wayne R. LaFave has pointed out, if ad hoc determinations dominate the execution of a search warrant, it is difficult to comprehend and apply relevant

factors correctly. The prospect for correct application, i.e., protecting liberty and privacy, are reduced. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.9(e), pp. 649-650 (3d ed. 1996). Other circuit courts have adopted an approach that treats issues, such as handcuffing and interviewing detainees, as a condition of detention to be evaluated in the context of the *Summers* guidelines. This approach provides law enforcement officers clear and workable guidelines and sufficient latitude to carry out their duties while protecting the liberty and privacy of detainees. The Supreme Court should review the *Mena* decision to reconcile the conflict among the circuit courts and to reestablish the guidelines in the *Summers* case.

ARGUMENT

1. The Conditions of Detention in *Mena* Were Reasonable Under Existing Case Law.

In *Summers*, the U.S. Supreme Court established guidelines that allow law enforcement officers to adopt standardized procedures for the execution of warrants to search for contraband at residences and for the detention of occupants. The *Summers* decision did not address the use of handcuffs or the interview of detainees. However, the *Summers* decision did identify the general reasons for security concerns, and did recognize the need for law enforcement officers to maintain unquestioned control of the situation. *Michigan v. Summers,* 452 U.S. at 702-703. Law enforcement officers often consider the use of handcuffs for these reasons. Contrary to the *Mena* decision, other circuit courts have adopted an approach that applies the guidelines in the *Summers* decision in a clear and workable manner. The use of handcuffs does not need to

be a "heightened security measure" that makes handcuffing detainees an unusual case outside the scope of the *Summers* guidelines. *Mena v. City of Simi Valley,* 332 F.3d at 1263.

A. The Circumstances of the *Mena* Search.

The *Mena* search occurred in 1998. The facts are drawn from the Petition. Officers Muehler and Brill were investigating a gang-related drive-by shooting. One of the suspects was a gang member linked to a missing gun and known to have lived at the residence to be searched. The residence was a house that had been modified to accommodate separate living quarters for many persons. Gang members were known to live there. The residence was possibly a gang "safe house." The officers obtained a warrant to search the entire residential property for weapons and evidence of gang membership. Anticipating that gang members and weapons may be present, the residence was secured by a SWAT team. Four occupants were present, including plaintiff. All were first confronted by the officers with drawn weapons. The occupants were handcuffed and taken to a furnished garage where they were held in handcuffs until the search was completed in two or three hours. The search produced a gun, ammunition, drugs, baseball bats and gang paraphernalia.

Plaintiff was a young and apparently healthy woman of Hispanic appearance. She was confronted while she slept in her room. She was wearing a long-sleeved tee-shirt and sweatpants as pajamas. After she was taken to the garage she was given a jacket and shoes. She was allowed to move about the garage. The other detainees were there as well. Plaintiff never asked to have her

handcuffs loosened. Plaintiff and the other detainees were asked about their immigration status. One occupant was found to be an illegal alien. It was known that gang members and their affiliates were often illegal aliens. Plaintiff was also asked for documentation of her immigration status.

This case appears to be a routine search for contraband in which the law enforcement officers had reasonable concerns for safety and the destruction or hiding of contraband, and reason to believe that one or more occupants of the residence may be illegal aliens.

B. The *Summers* Guidance.

For over twenty years law enforcement officers have planned operations for the execution of search warrants using the guidance provided by the U.S. Supreme Court in the case of *Michigan v. Summers,* 452 U.S. 692 (1981). *Summers* provided clear and workable rules and reasonable latitude to allow law enforcement officers to judge their actions and for law enforcement agencies to establish policies for execution of search warrants for contraband, including " . . . the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.,* 452 U.S. at 705.

The *Summers* court identified legitimate reasons for detention of occupants of the premises to be searched, including to prevent flight, to minimize the risk of harm to officers, to prevent destruction or hiding of evidence, and to facilitate an orderly and complete search. *Id.,* 452 U.S. at 702-703. The *Summers* court limited the period of detention to the time it took to conduct a "proper search" for contraband. *Id.,* 452 U.S. at 705. In this regard, the

court was aware that a search could take several hours. *Id.*, 452 U.S. 711 (Stewart, J., dissenting).

The *Summers* court did not require evidence of a special danger to justify detention for safety reasons. The court said, "Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Id.*, 452 U.S. at 702. No particularized reasonable suspicion was required to detain an occupant.

Finally, the *Summers* court made it clear that the court was adopting a categorical and reasonable rule, not a method of ad hoc analysis, to guide detention: "The rule we adopt today does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.*, 452 U.S. at 705, n. 19.

C. Search Procedures Similar to *Mena* Have Been Found Reasonable in Other Circuits.

Law enforcement agencies have used standardized procedures to develop plans for execution of search warrants. Handcuffing and questioning of detainees may be planned if known circumstances make these actions appear reasonable at the time planning is done. Cases from various jurisdictions indicated that this approach was and is acceptable. Courts have described the procedures used by police departments to execute warrants to search for drugs, all without criticizing the use of handcuffs *per se*. In *U.S. v. Fountain,* 2 F.3d 656 (6th Cir. 1993),

cert. denied, 510 U.S. 1014 (1993) the court held it reasonable and proportional for safety and evidence concerns to hold four men in a living room, handcuffed and lying on the floor while a warrant to search for drugs was conducted. In *People v. Ornelas,* 937 P.2d 867 (Colo. App. 1996) the court rejected an argument that the defendant was arrested as soon as he was handcuffed and relied on *Summers* to evaluate the reasonableness of the detention with handcuffs. In *Crosby v. Hare,* 932 F. Supp. 490 (W.D.N.Y. 1996), where the court held that absent special circumstances and without individualized suspicion it was reasonable for officers' safety that a naked woman (She was showering at the time police entered the premises.) be held first at gunpoint and then in handcuffs while officers conducted a security sweep of the residence before being allowed to dress and brought to the holding area in the residence.

At the time of the *Mena* search, even the Ninth Circuit had not considered handcuffing *per se* to be a unique issue. In *Franklin*, the Ninth Circuit did not criticize the plan of the Portland Police Bureau to pat, search and handcuff occupants of the residence and then detain them in a central location. Rather, the court found that the manner of detention was unjustified when an elderly disabled man, who was unable to walk or sit up without assistance because of multiple sclerosis, was kept in handcuffs that hurt him for a long period of time, wearing only a tee-shirt and with his genitals exposed to everyone in the living room where the detainees were kept. *Franklin v. Foxworth,* 31 F.3d 873, 876-878 (9th Cir. 1994). It was the pain, humiliation and indifference where circumstances clearly showed that no safety or security issue existed, not the handcuffs, that mattered. Not until

Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003), did the Ninth Circuit bring into question the reasonableness of detaining persons in handcuffs during execution of a warrant for search of evidence. *Id.,* 342 F.3d 1062.

2. Handcuffing as a "Heightened Security Measure."

In 1996, Professor Wayne R. LaFave noted that the use of handcuffs to secure detained occupants may affect the length of detention. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.9(e) (3d ed. 1996). In the 2004 supplement Professor LaFave cited several cases from the Fifth and Ninth circuits, including *Mena v. City of Simi Valley,* 226 F.3d 1031 (9th Cir. 2000), which were contrary to decisions in the Second, Third and Sixth circuits. Professor LaFave spotted a trend that threatens to develop into a significant split among the circuit courts, depriving law enforcement officers of the clear guidance they need to carry out their duties without undue fear of civil liability.

The *Heitschmidt v. City of Houston,* 161 F.3d 834 (5th Cir. 1998) and *Franklin v. Foxworth,* 31 F.3d 873 (9th Cir. 1994) cases expressed concern with the manner detention was carried out and the circumstances that could make detention unreasonably intrusive and unjustified. Handcuffing was one of the circumstances causing concern to these courts. More critical were other circumstances indicating unnecessary and onerous conditions imposed on the detainees. In *Heitschmidt*, the detainee was required to sit on a bar stool for 4.5 hours while handcuffed. The warrant was issued to search for records of prostitution, not contraband. The police knew the detainee and expected him to be at his residence. They had no reason to consider him a suspect or to interfere with the search, pose

a safety threat, or to flee. Yet, the detainee was lured from his home on a police ruse, forcibly handcuffed, and brought back into his home. *Heitschmidt v. City of Houston, supra,* 161 F.3d at 838-839. In *Franklin*, an elderly, incontinent, seriously disabled man with multiple sclerosis, who could not walk or sit without assistance, was held for over two hours dressed only in a tee-shirt with his testicles exposed to men and women in the living room where detainees were brought. *Franklin v. Foxworth, supra,* 31 F.3d at 876-878. These cases may well fit into the limitation the *Summers* court expresses in its footnote stating that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." 452 U.S. at 705, n. 21.

In *Mena*, the court held that " . . . because Mena was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals – such as physical roughness, threatening deadly force, and using handcuffs for an extended period." *Mena v. City of Simi Valley, supra,* 332 F.3d at 1263. For the first time, the Ninth Circuit identified handcuffs as a "heightened security measure." It appears that handcuffing of detainees is a special circumstance thus taking many searches out of the "routine case" category laid out by the *Summers* court.

The Ninth Circuit may have advanced the view that handcuffing *per se* is a unique case or circumstance requiring special justification in *Meredith v. Erath,* 342 F.3d 1057 (9th Cir. 2003). *Meredith* involved execution of a warrant by IRS agents to search for evidence of income tax code violations in a commercial building, not the search for contraband in a residence. However, agents discovered an

occupant on the third floor of the building, which agents did not know was used as a residence. The occupant was handcuffed and detained until the search was concluded. With this decision the Ninth Circuit announced that merely handcuffing a person and detaining her in handcuffs during a search for evidence was a violation of the Fourth Amendment, "absent justifiable circumstances." *Id.*, 342 F.3d at 1063. The court's ruling referred generally to execution of a search warrant for evidence and investigatory detentions. *Id.*, 342 F.3d at 1062. The Ninth Circuit also specifically noted that the *Summers* case did not involve handcuffing detainees. *Id.*, 342 F.3d at 1063.

The *Meredith* and *Mena* cases could be viewed as making handcuffing an unusual circumstance for which particularized suspicion against a detainee must first be established. Such an approach would make the standard procedures approach adopted in the *Summers* decision impractical in most cases, because law enforcement officers will not have the level of precise and particularized information necessary to plan for execution of a search warrant in a safe and effective manner. Law enforcement officers will be compelled to make most of their decisions in the field rather than adopting a reasonable, planned approach to detention decisions and adapting to circumstances found in the field based on the application of clear and workable guidelines.

It is difficult to consider handcuffing to be an unusual case *per se* when executing a warrant at a residence where police are searching for drugs or guns and expect gang members to be present. When planning the tactics for entry, officers must anticipate the risks identified in *Summers* (flight, destruction of evidence, safety, and interference with the search). It is necessary to maintain

control of the place and the occupants, whose cooperation and passivity cannot be assured. It may appear reasonable to detain occupants in handcuffs rather than depend upon other potentially more violent means of maintaining security. Any person who is not infirm and is in the milieu of guns, drugs and gangs, cannot be assumed to be harmless. Risk is inherent in the situation. As the court noted in *Michigan v. Summers,* 452 U.S. 692, 702-703 (1981), "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." So long as the search is carried out expeditiously and not prolonged for unrelated reasons, detaining occupants in handcuffs and questioning occupants may be prudent and reasonable, unless other egregious circumstances develop that clearly make the conditions of confinement unduly painful, humiliating, prolonged or unnecessary.

In other circuit courts handcuffing detainees is one of the conditions of detention to be evaluated according to the guidelines in *Summers*, and law enforcement officers are given reasonable latitude to make judgments on the scene and at the time of the search.

3. The Approach Followed by Other Circuits Is More Workable and Provides Greater Clarity.

The *Summers* decision has been justifiably praised. In his treatise, Professor Wayne R. LaFave praised the court's opting for a standardize procedure. He said:

> "This is because it reflects express recognition by the Court of the desirability of the standardized procedure alternative and also because it illustrates a very sound use of that approach. As

> pointed out elsewhere, standardized procedures are often to be preferred over ad hoc determinations because, in the long run, they will advance rather than reduce the protection of liberty and privacy. A legal principle which would produce the theoretically correct result 100% of the time but which is so difficult to comprehend and apply that at best it will be correctly used by the police only 75% of the time is not to be preferred over a standardized procedure which can be correctly applied in virtually all cases but which will produce the theoretically "correct" result only 95% of the time."

2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.9(e), pp. 649-650 (3d ed. 1996).

Contrary to the Ninth Circuit, other circuits have followed the *Summers* guidelines, holding that law enforcement officers may detain and question occupants of a residence while executing a warrant in search of contraband, including the handcuffing of the occupants until the search is completed, absent special circumstances that may make the conditions of detention excessive or egregious. These circuit courts, as this court did in *Summers*, recognize that where drugs are present weapons are also likely to be present, and law enforcement officers must be given some latitude to maintain control of the search scene.

For example, in *Torres v. U.S.*, 200 F.3d 179 (3rd Cir. 1999), the court relied on *Summers* to hold that handcuffing detainees while searching a residence suspected as the site of a large cocaine distribution ring was reasonable and justified in the absence of special circumstances. *Id.*, 200 F.3d at 186. The court did not require law enforcement officers to specify facts pointing to particular individuals to

justify their actions. Indeed, police had mistakenly searched the wrong house. *Id.*, 200 F.3d at 182.

And, in *U.S. v. Fountain*, 2 F.3d 656 (6th Cir. 1993), the court found holding the occupants in handcuffs and lying on the floor during the search of a residence for drugs was reasonable. The court relied on *Summers*. Law enforcement officers had sufficient concern for their safety and to prevent disposal of contraband because they were searching in a confined and unfamiliar environment likely to be dangerous. The court found that the detainee's apparent voluntary connection with the house was sufficient to give law enforcement officers a reasonable suspicion of criminal activity and to detain him. *Id.*, 2 F.3d at 663. In this case, that included investigatory interviews of the detainees. The facts that the law enforcement officers had a search warrant, the house was known as a drug house, the detainee appeared to be more than a casual visitor and drugs and guns were found during the search, objectively justified the interviews. *Id.*, 2 F.3d at 665.

Finally, in *U.S. v. Childs*, 277 F.3d 947 (7th Cir. 2002), the court held that questioning of persons detained were not searches or seizures and need not be justified by law enforcement officers: "Questions asked during detention may affect the reasonableness of that detention (which *is* a seizure) to the extent that they prolong the custody, but questions that do not increase the length of detention (or extend it by only a brief time) do not make the custody itself unreasonable or require suppression of evidence found as a result of the answers." *Id.*, 277 F.3d at 949. The court pointed out that questioning of persons held in various detention settings, such as prisons or as passengers on public conveyances and venues, has commonly been held not to be a violation of the Fourth Amendment.

In this regard, the questioning need not be related to the reasons for the detention: "Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics that may burden the public – for all suspects (even the guilty ones) may protect themselves fully by declining to answer. Nor do the questions forcibly invade any privacy interest or extract information without the suspects' consent." *Id.*, 277 F.3d at 954.

A sufficient number of cases have developed in other circuit courts to demonstrate that the standardized procedural approach set forth in the *Summers* decision is sound and can accommodate consideration of the conditions of confinement, including handcuffing detainees, without immediate resort to the "unusual case" exception. In some respects, the U.S. Supreme Court has created this circumstance by its footnote to its holding in *Summers*, which did not clarify or limit the "special circumstances" in the "unusual case." *Michigan v. Summers*, 452 U.S. at 705 n. 21.

CONCLUSION

This court should take this opportunity to reaffirm the standardized procedural approach adopted in *Summers,* and to establish that handcuffing detained persons occupying a residence during a search for contraband pursuant to a valid search warrant is not a special circumstance or unusual case *per se*. Rather, handcuffing, as all other conditions of detention, must be evaluated according to the guidelines in *Summers*. Law enforcement officers should

have latitude to handcuff occupants of a residence. As a matter of public policy, occupants and law enforcement officers will be better served by clear guidelines. Cases involving egregious circumstances, such as those found in the *Heitschmidt* and *Franklin* cases, will remain unusual cases where the guidelines of the *Summers* decisions have been clearly exceeded.

This approach is consistent with the purposes underlying the qualified immunity defense, which is intended to provide law enforcement officers with some reasonable margin for error so they may carry out their duties without undue fear of civil liability. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

For the reasons stated herein, the PORAC Legal Defense Fund and its affiliates respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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August 30, 2004

PETITION FOR CERTIORARI FILED APRIL 13, 2004
CERTIORARI GRANTED JUNE 14, 2004

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Trial Exhibit No. 10: Simi Valley Policy and Procedure Manual, *Mena* v. *City of Simi Valley*, No. CV 98-8512 AHM (C.D. Cal. 2001) 233

Trial Exhibit No. 11: Simi Valley Police Department Special Operations Unit Tactical Operation Plan, *Mena* v. *City of Simi Valley*, No. CV 98-8512 AHM (C.D. Cal. 2001) 240

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioners' Appendix to the 03-1423 Petition For A Writ Of Certiorari at the following pages:

Mena v. *City of Simi Valley*, 354 F.3d 1015 (9th Cir. 2004) 23a-34a

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIV.)

Civil Docket For Case #: 98-CV-8512

IRIS MENA, JOSE E. MENA,
Plaintiffs,

v.

CITY OF SIMI VALLEY, RANDY G. ADAMS, DARIN L. MUEHLFR, ROBERT BRILL, M. HODGES #309, R. NMI JONES #305, V. ALLEGRA #320, A. MCCORD, LT. DICK THOMAS, SGT. RON CHAMBERS, BILL LAPPIN, ARNOLD BAYNARD, JEFF DOMINICK, JACK GREENBURG, RICHARD LAMB, FRANK AHLVERS, JOHN ADAMCZYK, TIM BROWN,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/19/98	1	COMPLAINT filed Summons(es) Issued referred to Discovery Ann I. Jones (bg) [Entry date 10/20/98]
11/18/98	2	ANSWER filed by defendant Simi Valley City of, defendant Randy G Adams, defendant Darin L Muehler, defendant Robert Brill, defendant M Hodges, defendant R NMI Jones, defendant Unknown McConnell, defendant V Allegra, defendant A McCord to complaint [1-1]; jury demand (jag) [Entry date 11/19/98]

DATE	NO.	PROCEEDINGS
12/4/98	3	JOINT REPORT OF EARLY MEETING OF COUNSEL filed. Estimated length of trial 6-9 days. (lori) [Entry date 12/07/98]
2/2/99	4	ORDER re Joint Status Rep & MSC by Judge A. H. Matz ; mandatory status conference set on 1:30 3/15/99 (lori) [Entry date 02/03/99]
2/9/99	5	STIPULATION and ORDER tht the crt hereby deems plfs' 1st A/C, ldge w/ the crt, fi. Plf's 1st A/C is deemed svd purs to LR 3.8.4 by Judge A. H. Matz (lori) [Entry date 02/10/99]
2/9/99	6	1st AMENDED COMPLAINT [1-1] by plaintiff Jose E Mena, plaintiff Iris Mena terminating defendant Does; adding Dick Thomas, Ron Chambers, Bill Lappin, Arnold Baynard, Jeff Dominick, Jack Greenburg, Richard Lamb, Frank Ahlvers, John Adamczyk, Tim Brown. (lori) [Entry date 02/10/99]
2/22/99	7	ANSWER to 1st A/C filed by dfts A McCord, V Allegra, Unknown McConnell, R NMI Jones, M Hodges, Robert Brill, Darin L Muehler, (Chief) Randy G Adams, Simi Valley City of, Dick Thomas, Ron Chambers, Bill Lappin, Arnold Baynard, Jeff Dominick, defendant Jack Greenburg, defendant Richard Lamb, defendant Frank Ahlvers, defendant John Adamczyk, defendant Tim Brown to amended complaint [6-1]; jury demand (lori) [Entry date 03/02/99]

DATE	NO.	PROCEEDINGS
3/9/99	9	Joint STATUS REPORT (lori) [Entry date 03/11/99]
3/10/99	8	ORDER re prop prot ord: 1) Paragraph 4 contemplates tht when "any Confidential material is used in any crt proc in this act, it shall not lose it confidential status thru such use." This paragraph must be revised to reflect tht all info used at trl is presumptively avail to all members of the public, unless sufficient cause is shown in adv of trl by Judge A. H. Matz (lori) [Entry date 03/11/99]
3/11/99	—	PLACED IN FILE—NOT USED re stip prot ord (cpy) (lori) [Entry date 03/12/99]
3/15/99	10	MINUTES: ; mandatory status conference held; Karen Peabody is design as lead cnsl. Crt refers this mtr to Mag Judge Jones for sttlmt purp. Crt ords plf to make a sttlmnt dmd & dft to consider the dmd. Last date for a sttlmnt conf is 8/16/99 by Judge A. H. Matz CR: Lynne Smith (lori) [Entry date 03/17/99]
		* * * *
6/11/01	97	JOINT JURY INSTRUCTIONS; Index submitted (bg) [Entry date 06/12/01]
6/11/01	98	TRIAL brief re qualified immunity submitted by defendants (bg) [Entry date 06/12/01]
6/11/01	99	TRIAL briefs re unlawful detention submitted by defendants (bg) [Entry date 06/12/01]

DATE	NO.	PROCEEDINGS
6/11/01	100	TRIAL brief re damage to property during search warrrant service submitted by defendant (bg) [Entry date 06/12/01]
6/11/01	101	TRIAL briefs re "Knock & Announce Requirement" submitted by defendants (bg) [Entry date 06/12/01]
6/11/01	102	TRIAL briefs re scope of search submitted by defendants (bg) [Entry date 06/12/01]
6/12/01	103	MINUTES: 1st Day Jury Trial impaneled & sworn; Opening Stmts made by Plfs & Dfts; Wits CST; Exhs rcd; Case cont to 6/13/01 @ 8:00 for fur trial; Dft's motion in limine to exclude testimony of undisclosed wits [95-1] granted in part/denied in part w/conditions by Judge A. H. Matz CR: Lynne Smith (ir) [Entry date 06/15/01]
6/13/01	105	MINUTES: 2nd day J/T by Judge A.H. Matz; ; jury trial cont on 8:00 6/14/01 CR: Lynne Smith (yc) [Entry date 06/19/01]
6/14/01	106	MINUTES: 3rd day J/T by Judge A. H. Matz; ; jury trial cont on 8:00 6/15/01 CR: Lynne Smith (yc) [Entry date 06/19/01]
6/15/01	104	TRIAL briefs submitted by plaintiff Jose E Mena, plaintiff Iris Mena, re admissibility of expert opinions. (yc) [Entry date 06/19/01]
6/15/01	107	MINUTES: 4th day J/T by Judge A.H. Matz; ; jury trial cont on 8:30 6/19/01; Crt and cnsl confer re jury inst. Crt instructs cnsl to come to crt on 6/18/01 no earlier than 4pm to view the revised jury inst. CR: Lynne Smith (yc) [Entry date 06/19/01]

DATE	NO.	PROCEEDINGS
6/18/01	108	MINUTES: Status conf hld; crt & cnsl confer re final jury instrucs & special verdict forms; dfts w/draw exh 53 from evidence by Judge A. H. Matz CR: Lynne Smith (lc) [Entry date 06/25/01]
6/19/01	109	MINUTES: J/T 5th day; wits CST; exhs identified; dft rest; closing arguments by plf & dfts; crt instructs jury; balif sworn; jury retires to deliberate; jury trial cont on 8:45 6/20/01; crt denies plf rule 50 motion by Judge A. H. Matz CR: Lynne Smith (lc) [Entry date 06/25/01]
6/19/01	111	TRIAL WITNESS & EXHIBIT list (lc) [Entry date 06/26/01]
6/19/01	112	JURY INSTRUCTIONS submitted (1c) [Entry date 06/26/01]
6/20/01	110	MINUTES: J/T 6th day; jury retires to deliberate; jury trial cont on 8:00 6/21/01; after conferring with cnsl, Crt resp to jury notes 2, 3, & 4 by Judge A. H. Matz CR: Lynne Smith (lc) [Entry date 06/25/01]
6/21/01	113	JURY LIST (seating chart) (lc) [Entry date 06/26/01]
6/21/01	114	JURY NOTES #1 filed (lc) [Entry date 06/26/01]
6/21/01	115	JURY NOTES #2 filed (lc) [Entry date 06/26/01]
6/21/01	116	JURY NOTES #3 filed (lc) [Entry date 06/26/01]

DATE	NO.	PROCEEDINGS
6/21/01	117	JURY NOTES #4 filed (lc) [Entry date 06/26/01]
6/21/01	118	JURY NOTES #5 filed (lc) [Entry date 06/26/01]
6/21/01	119	JURY NOTES #6 filed (lc) [Entry date 06/26/01]
6/21/01	120	SPECIAL VERDICT for plf against defendant Darin L Muehler for $10,000 nominal damages & $20,000 punitive damages for Iris Mena; against defendant Robert Brill for $10,000 nominal damages for Iris Mena & $20,000.00 punitive damages for Iris Mena (lc) [Entry date 06/26/01] [Edit date 06/26/01]
6/21/01	121	ATTORNEY'S LIST (lc) [Entry date 06/26/01]
6/21/01	122	MINUTES: J/T 7th day; fld wit & exh list, juror list; jury rtns; jury verdict in favor of plfs read & fld; jury polled, jury notes & jury instrucs fld; Crt ORD Mr Muller to prep jgm & svc it on Mr Nye; jury trial ends 6/21/01 terminating case (MD JS-6) by Judge A. H. Matz CR: Lynne Smith (ENT 6/26/01) (lc) [Entry date 06/26/01]
7/10/01	123	JUDGMENT AND ORDER that plf have jgm agnst dft Darin Muehler in amt of $10,000.00 in general damages & in amt of $20,000.00 punitive damages & recover costs from dfts Darin Muehler & Robert Brill; Iris Mena recover atty fees to be determined by crt frm Darin Muehler &

DATE	NO.	PROCEEDINGS
		Robert Brill; plf shall propose amts to dfts lawyer, if no agreement, make a motion by Judge A. H. Matz (ENT 7/11/01) send/ntcs (lc) [Entry date 07/11/01]
7/25/01	124	NOTICE OF MOTION AND MOTION by defendants Darin L Muehler, Robert Brill to alter or amend judgment [123-1] (FRCP 59(a), or alt for new trial (FRCP 59(a), & renewed mot for jgm as a matter of law (FRCP 50(b); motion hearing set for 10:00 8/20/01; memo of PA; Decl of David L Nye (ir) [Entry date 07/26/01]

* * * *

U.S. COURT OF APPEALS
NINTH CIRCUIT

Court of Appeals Docket #: 01-56673

IRIS MENA,
Plaintiff-Appellee,

and

JOSE E. MENA,
Plaintiff,

v.

CITY OF SIMI VALLEY; RANDY G. ADAMS; MARVIN HODGES; ROY JONES; VINCENT ALLEGRA; ALAN MCCORD; RICHARD THOMAS; RONALD CHAMBERS; WILLIAM LAPPIN; ARNOLD BAYNARD; JEFFREY DOMINICK; JACK GREENBURG; RICHARD LAMB; FRANK AHLVERS; JOHN ADAMCZYK; TIM BROWN,
Defendants,

and

DARIN L. MUEHLER; ROBERT BRILL,
Defendants-Appellants.

DOCKET ENTRIES

DATE	PROCEEDINGS
9/26/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: Fee payment is due 10/10/01 ; appellant's designation of RT is due 9/20/01, ; appellee's designation of

DATE	PROCEEDINGS
	RT is due 10/1/01; appellant shall order transcript by 10/10/01, ; court reporter shall file transcript in DC by 11/13/01, ; certificate of record shall be filed by 11/19/01 ; appellant's opening brief is due 12/27/01, ; appellees' brief is due 1/28/02; appellants' reply brief is due 2/11/02, ; [01-56673] (pg)
9/26/01	Filed David L. Nye for Appellant Darin L. Muehler & Robert Brill Civil Appeals Docketing Statement served on 9/7/01 (to CONFATT) [01-56673] [01-56673] (pg)
9/26/01	Prev 99-56720 JTN SST MSB to any PANEL [01-56673] (aw)
10/18/01	Received notification from District Court re payment of docket fee. (Date: pd: 10/16/01) [01-56673] (lu)
11/1/01	Filed order CONFATT (bsp) This case is under consideration for inclusion in the mediation program. A settlement assessment conference will be held by telephone on 11/19/01, at 11:00 am Pacific (SF) time. . . . The br sch previously set by the ct remains in effect. [01-56673] (gva)
11/27/01	Filed order CONFATT (MAC) releasing case from CONFATT and the briefing schedule set forth in the courts order filed 9/26/01 shall remain in effect. [01-56673] (jjf)
12/19/01	Filed motion & clerk order Promo: (Deputy Clerk: cb) The clerk is in receipt of aplts' notice of reporter default. Review of the notice reveals that payment arrangement were made 11/19/01; the rts are therefore due 12/19/01. The br sch is as follows: the opening br and excs are due 1/28/02,

DATE	PROCEEDINGS
	the ans br is due 2/27/02, and the optional rpy br is due 14 days from service of the ans br. A copy of this order shall be provided to Ctr Lynn Smith. (mtn rcvd 12/13/01) [4322429-1] [01-56673] (gva)
1/4/02	Filed Court Reporter's motion & clerk order Promo: (Deputy Clerk: cb) Ctr Lynne Smith's mtn for an ex.tm.f the rt is granted. The rt is due 2/20/02. . . . The br sch is as follows: the opening br and excs are due 4/1/02, the ans br is due 5/1/02 and the optional rpy br is due 14 days from service of the ans br. A copy of this order shall be provided to the ctr at the d.c. (mtn rcvd 12/21/01) [01-56673] (gva)
2/1/02	Rec'd notice of change of firm name from David L. Nye, counsel for John Adamczyk, Tim Brown, Jack Greenburg, Richard Lamb, William Lappin, Arnold Baynard, Jeffrey Dominick, Frank Ahlvers, Richard Thomas, Ronald Chambers, Vincent Allegra, Alan McCord, Robert Brill, Marvin Hodges, Roy Jones, City of Simi Valley, Randy G. Adams and Darin L. Muehler dated 01/29/02. (CASEFILE) [01-56673] (sm)
2/26/02	Filed court reporter motion & clerk order Promo: (Deputy Clerk: lkk) Ctr Lynne Smith's second motion for an ex.tm.f the ctr's rt is granted. The rt is due 4/1/02. . . . The opening br is due 5/13/02. The answering br is due 6/12/02 and the optional rpy is due 14 days from service of the ans br. A copy of this order shall be provided to the ctr at the dc. (mtn rcvd 2/21/02) [4370747-1] [01-56673] (gva)

DATE	PROCEEDINGS
5/10/02	Filed court reporter motion & clerk order Promo: (Deputy Clerk: lkk) The ct is in receipt of ctr Lynn Smith's ltr dated 4/30/02 and shall construed it as a mtn to modify the clerk's 2/26/02 order. So construed, the mtn is granted. This order waives the mandatory fee reduction provided that the rts are filed within the time allowed in this order. (mtn rcvd 5/3/02) [4428484-1] [01-56673] (gva)
5/10/02	14 day oral extension by phone of time to file Appellant Darin L. Muehler, Appellant Robert Brill brief. [01-56673] appellants' brief due 5/28/02, ; appellees' brief due 6/27/02; appellants' reply brief due, ; (jlc)
5/22/02	Filed certificate of record on appeal RT filed in DC 4/3/02. [01-56673] (bg)
6/18/02	Received notice of appearance of Paul L. Hoffman as counsel for aples; served on 6/14/02 (Casefile) [01-56673] (gva)
6/18/02	Filed original & 15 copies Appellants Darin L. Muehler, Robert Brill opening brief (Informal: n) 43 pages & 5 Excs in 2 Vols.; served on 5/28/02 [01-56673] (gva)
6/27/02	Filed motion & clerk order Promo: (Deputy Clerk: cag) Aplt's mtn for leave to file a late br is denied as unnecessary. The opening br was timely received and filed. Aple's mtn for an ex.tmf. in which to file the ans br is granted. The ans br is due 8/19/02 and the optional rpy br is due 14 days from service of the ans br. . . . (mtn rcvd 6/21/02) [4467666-1] [01-56673] (gva)

DATE	PROCEEDINGS
8/21/02	14 day oral extension by phone of time to file Appellant Darin L. Muehler, Appellant Robert Brill's reply brief. [01-56673] appellants' reply brief due 9/19/02,; (terr)
8/21/02	Filed original & 15 copies Aple Iris Mena's 49 pages brief, 5 Supplemental Excs.; served on 8/19/02 [01-56673] (gva)
9/20/02	Filed original & 15 copies Aplts' reply brief (Informal: n) 13 pages; 5 Supplemental Excs.; served on 9/19/02 [01-56673] (gva)
9/27/02	Filed motion & clerk order Promo: (Deputy Clerk: tah) The aplt's mtn requesting transfer of an exhibit from the cc, and any response thereto, shall be referred for disposition to the panel that considers the merits of the case. The exhibit shall be retained in the dc pending the ct's decision on the instant motion. (mtn rcvd 9/20/02) [01-56673] (gva)
11/1/02	Calendar check performed [01-56673] (aw)
11/18/02	Calendar materials being prepared. [01-56673] [01-56673] (aw)
11/20/02	CALENDARED: PASA Feb 4 2003 900 am Courtroom 3 [01-56673] (aw)
1/29/03	Filed order (Depuy Clerk: hh) Defs/Aplts' Motion Requesting Transfer of Exhibit on appeal is denied. (phoned/faxed) [4542138-1] [01-56673] (gva)
2/4/03	ARGUED AND SUBMITTED TO Harry PREGERSON, Stephen R. REINHARDT, Glenn L. Archer [01-56673] (dr)

DATE	PROCEEDINGS
6/23/03	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Harry PREGERSON, author; Stephen R. REINHARDT; Glenn L. Archer.) FILED AND ENTERED JUDGMENT. [01-56673] (dg)
7/3/03	Filed motion & clerk order (Deputy Clerk: gva) granting aplts' motion to extend time in which to file a petition for rehearing en banc; to and including 7/14/03. (mtn rcvd 7/3/03) [4781447-1] [01-56673] (gva)
7/7/03	Filed Aple Iris Mena bill of costs ($289.68); served on 7/3/03 [01-56673] (gva)
7/10/03	Filed Iris Mena motion to have District Court decide attorneys fees on appeal; declaration of Paul Hoffman; served on 7/9/03 (Panel) [4786253] (gva)
7/14/03	[4788284] Filed original and 50 copies Appellant Darin L. Muehler petition for panel rehearing and petition for rehearing en banc 15 p.pages, served on 7/11/03 (PANEL AND ALL ACTIVE JUDGES) [01-56673] (dg)
7/18/03	Filed Aplt Robert Brill opposition to motion to have district court decide attorney's fees on appeal; declaration of Karen Peabody; served on 7/17/03 (Panel) [01-56673] (gva)
7/24/03	Filed Aple Iris Mena reply to opposition to motion to have court decide attorneys fees on appeal; served on 7/23/03 (Penal) [01-56673] (gva)

DATE	PROCEEDINGS
8/4/03	Filed order (Harry PREGERSON): Aple is requested to file a response to the P/R en banc within 21 days of the date of filing of this order. [01-56673] (dg)
8/12/03	Filed Aple Iris Mena motion to extend time to file response to petition for rehearing and suggestion for rehearing en banc; declaration of Paul L. Hoffman; served on 8/11/03 (Panel) [4816345] (gva)
8/20/03	Filed order (Harry PREGERSON, Stephen R. REINHARDT, Glenn L. Archer): Aple Mena's motion for extension of time to file response to petition for rehearing and suggestion for rehearing en banc is granted. The response shall be filed on or before 9/2/03 (phoned/faxed) [4816345-1] [01-56673] (gva)
9/2/03	Filed Aple Iris Mena's response to Aplts' 16 pages petition for enbanc rehearing; served on 8/29/03 (Panel And All Active Judges) [4788284-1] [01-56673] (gva)
1/14/04	Filed order FOR PUBLICATION (Harry PREGERSON, Stephen R. REINHARDT, Glenn L. Archer): . . . The petition for rehearing and the suggestion for rehearing en banc are denied. [4788284-1] [01-56673] (gva)
1/22/04	MANDATE ISSUED with costs taxed in the reduced amount of $144.02 in favor of aple. [01-56673] (mhf)
1/26/04	Filed aple Iris Mena's mtn to have dc decide attys fees; [01-56673] served on 1/23/] (mhf)

DATE	PROCEEDINGS
1/30/04	Filed order (Harry PREGERSON, Stephen R. REINHARDT, Glenn L. Archer): Appellee's motion to have District Court decide attorneys fees on appeal is granted. [01-56673] (gva)
2/2/04	Filed Aplt's opposition to motion to have district court decide attorneys fees on appeal; declaration of Karen Peabody; served on 1/29/04 (Panel) [01-56673] (gva)
4/20/04	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 03-1423 filed on 4/13/04. (Panel) [01-56673] (gva)
4/22/04	NO ORIGINAL RECORD (jay)
6/28/04	Received notice from Supreme Court, petition for certiorari GRANTED on 6/14/04. Supreme Court No. No. 03-1423 (Panel) (gva)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Feb. 9, 1999]

Case No. CV 98-8512 AHM (AIJx)

IRIS MENA and JOSE E. MENA,
Plaintiffs,

v.

CITY OF SIMI VALLEY, CHIEF OF POLICE RANDY G. ADAMS, POLICE OFFICERS DARIN L. MUEHLER, ROBERT BRILL, M. HODGES #309, R. JONES #305, MCCONNELL, V. ALLEGRA #320, A. MCCORD, LT. DICK THOMAS, SGT. RON CHAMBERS, BILL LAPPIN, ARNOLD BAYNARD, JEFF DOMINICK, JACK GREENBURG, RICHARD LAMB, FRANK AHLVERS, JOHN ADAMCZYK, AND TIM BROWN,
Defendants.

FIRST AMENDED COMPLAINT FOR DAMAGES FOR:

1) VIOLATIONS OF CIVIL RIGHTS UNDER 42 U.S.C. § 1983 (WRONGFUL SEARCH);
2) VIOLATIONS OF CIVIL RIGHTS UNDER 42 U.S.C. § 1983 (ILLEGAL DETENTION AND ARREST)
3) VIOLATIONS OF CIVIL RIGHTS UNDER CAL. CIV. CODE SECTION 52.1. (WRONGFUL SEARCH)
4) VIOLATIONS OF CIVIL RIGHTS UNDER CAL. CIV. CODE SECTION 52.1. (ILLEGAL DETENTION AND ARREST)
5) NEGLIGENCE

PARTIES

1. Plaintiffs IRIS MENA and JOSE MENA are competent adults.

2. Defendant CITY OF SIMI VALLEY is a City operating pursuant to its Charter and the laws of the State of California. Defendant RANDY G. ADAMS is the Chief of Police of the CITY OF SIMI VALLEY.

3. Defendant CITY OF SIMI VALLEY is vicariously liable for the wrongful conduct of their employees pursuant to Cal. Gov't Code § 815.2, as to the state law claims for relief. .

4. Defendants DARIN L. MUEHLER, ROBERT BRILL, M. HODGES #309, R. JONES #305, MCCONNELL, V. ALLEGRA #320, A. MCCORD, LT. DICK THOMAS, SGT. RON CHAMBERS, BILL LAPPIN, ARNOLD BAYNARD, JEFF DOMINICK, JACK GREENBURG, RICHARD LAMB, FRANK AHLVERS, JOHN ADAMCZYK, AND TIM BROWN are law enforcement officers.

5. In doing the acts herein alleged, all the foregoing defendants were acting under color of state law and within the scope and course of their employment.

6. Plaintiffs sue defendants Does 1 to 10 by such fictitious names because their true identities have yet to be ascertained.

7. Plaintiffs have complied with the requirements of Government Code §§905 et. seq. This action was filed within six months of the date of rejection of their claims.

FIRST CLAIM FOR RELIEF

VIOLATIONS OF CIVIL RIGHTS UNDER 42 U.S.C. § 1983—WRONGFUL SEARCH

(PLAINTIFFS IRIS MENA AND JOSE E. MENA AGAINST DEFENDANTS CITY OF SIMI VALLEY, CHIEF OF POLICE RANDY G. ADAMS, POLICE OFFICERS DARIN L. MUEHLER, ROBERT BRILL, M. HODGES #309, R. JONES #305, MCCONNELL, V. ALLEGRA #320, A. MCCORD, LT. DICK THOMAS, SGT. RON CHAMBERS, BILL LAPPIN, ARNOLD BAYNARD, JEFF DOMINICK, JACK GREENBURG, RICHARD LAMB, FRANK AHLVERS, JOHN ADAMCZYK, AND TIM BROWN)

8. Plaintiffs incorporate by reference the allegations of paragraphs 1-7 of this complaint.

9. Plaintiffs IRIS MENA AND JOSE E. MENA resided at 1363 Patricia Street, Simi Valley, California on February 3, 1998.

10. On or about January 29, 1998, defendant police officers obtained a search warrant for 1363 Patricia Street, Simi Valley, California and served it at the aforementioned residence. Plaintiffs are informed and believe and thereon allege that the warrant was overbroad, obtained in bad faith, that the warrant was not supported by probable cause, that a reasonable police officer should have known that the warrant was lacking in probable cause, and that the warrant was not properly issued by a neutral and detached magistrate.

11. On or about February 3, 1998 defendant police officers without a valid search warrant, probable cause, exigent circumstances or permission entered and searched the entire residence located at 1363 Patricia Street, Simi Valley, California.

12. Defendants police officers executed the search in an unreasonable manner, including, without limitation, forcing entry into plaintiffs' home, destroying property unnecessarily, ransacking it, pointing guns at plaintiff IRIS MENA, and arresting and detaining plaintiff IRIS Mena for an unreasonable time and in an unreasonable manner and without probable cause or reasonable suspicion.

13. Defendants police officers each failed to prevent the illegal entry into plaintiffs' home by their co-defendants and others and each failed to prevent the unreasonable manner in which plaintiffs' home was searched and plaintiff IRIS MENA was treated by their co-defendants and others.

14. Plaintiffs are informed and believe and thereon allege that in doing the foregoing acts, each defendant was the agent and employee of each other defendant and was acting within such agency and employment.

15. Plaintiffs are informed and believe and thereon allege that at all times herein mentioned, the CITY OF SIMI VALLEY and CHIEF ADAMS authorized and ratified the wrongful acts of the individual defendants and that defendants' wrongful conduct was the result of a policy, custom and practice of the CITY OF SIMI VALLEY and CHIEF ADAMS to harass, intimidate and violate the rights of minority residents, including Latinos. Pursuant to this policy, custom and practice, defendants CITY OF SIMI VALLEY and CHIEF ADAMS maintained and employed the aforementioned individual defendants as police officers and knew or should have known that these defendants each had a propensity for violence and racially based discriminatory conduct. Moreover, defendants CITY OF SIMI VALLEY and CHIEF ADAMS inadequately trained, supervised and instructed these defendants in the arts of law enforcement.

16. As a proximate result of the foregoing wrongful acts of defendants, and each of them, plaintiffs have been hurt and injured in their health, strength and activity, sustaining injury to their nervous system and person, all of which injuries have caused and continue to cause plaintiffs great mental, physical and nervous pain and suffering, humiliation, shock, distress and anguish.

17. As a proximate result of the foregoing wrongful acts of defendants, and each of them, real and personal property belonging to plaintiffs was destroyed and damaged.

18. As a proximate result of the foregoing wrongful acts of defendants, and each of them, plaintiffs have lost income in an amount in accordance with proof.

19. As a proximate result of the foregoing wrongful acts of defendants, and each of them, plaintiffs have incurred medical expenses in an amount in accordance with proof.

20. In doing the foregoing wrongful acts, defendants, and each of them, were motivated by invidious, anti-latino animus. The wrongful acts, and each of them, were willful, oppressive, fraudulent and malicious, and were conducted in reckless disregard of plaintiff's federal constitutional rights.

21. By way of the foregoing, defendants, acting under color of state law, deprived plaintiffs of rights, privileges, and immunities secured by the Constitution and laws of the United States, in particular the Fourth and Fourteenth Amendments of the United States Constitution, all to plaintiff's damage as hereinabove alleged.

SECOND CLAIM FOR RELIEF

VIOLATIONS OF CIVIL RIGHTS UNDER 42 U.S.C. § 1983—ILLEGAL DETENTION AND ARREST

(PLAINTIFF IRIS MENA AGAINST DEFENDANTS CITY OF SIMI VALLEY, CHIEF OF POLICE RANDY G. ADAMS, POLICE OFFICERS DARIN L. MUEHLER, ROBERT BRILL, M. HODGES #309, R. JONES #305, MCCONNELL, V. ALLEGRA #320, A. MCCORD, LT. DICK THOMAS, SGT. RON CHAMBERS, BILL LAPPIN, ARNOLD BAYNARD, JEFF DOMINICK, JACK GREENBURG, RICHARD LAMB, FRANK AHLVERS, JOHN ADAMCZYK, AND TIM BROWN)

22. Plaintiffs incorporate by reference the allegations of paragraphs 1-21 of this complaint.

23. Defendants detained and arrested plaintiff IRIS MENA without probable cause or reasonable suspicion of criminal activity.

24. Defendants each failed to prevent or stop the illegal detention and arrest of plaintiff IRIS MENA by their co-defendants.

THIRD CLAIM FOR RELIEF

VIOLATIONS OF CIVIL RIGHTS UNDER CAL. CIV. CODE § 52.1—WRONGFUL SEARCH

(PLAINTIFFS IRIS MENA AND JOSE E. MENA AGAINST DEFENDANTS CITY OF SIMI VALLEY, CHIEF OF POLICE RANDY G. ADAMS, POLICE OFFICERS DARIN L. MUEHLER, ROBERT BRILL, M. HODGES #309, R. JONES #305, MCCONNELL, V. ALLEGRA #320, A. MCCORD, LT. DICK THOMAS, SGT. RON CHAMBERS, BILL LAPPIN, ARNOLD BAYNARD, JEFF DOMINICK, JACK GREENBURG, RICHARD LAMB, FRANK AHLVERS, JOHN ADAMCZYK, AND TIM BROWN)

25. Plaintiffs incorporate by reference the allegations of paragraphs 1-24 of this complaint.

26. Defendants by means of threats, coercion and intimidation interfered with the constitutional rights of plaintiffs, by entering and searching their home, in violation of the California Constitution and the immunities secured by the Fourth, and Fourteenth Amendments to the United States Constitution, all to plaintiffs' damages as hereinabove alleged.

FOURTH CLAIM FOR RELIEF

VIOLATIONS OF CIVIL RIGHTS UNDER CAL. CIV. CODE § 52.1—WRONGFUL DETENTION AND ARREST

(PLAINTIFF IRIS MENA AGAINST DEFENDANTS CITY OF SIMI VALLEY, CHIEF OF POLICE RANDY G. ADAMS, POLICE OFFICERS DARIN L. MUEHLER, ROBERT BRILL, M. HODGES #309, R. JONES #305, MCCONNELL, V. ALLEGRA #320, A. MCCORD, LT. DICK THOMAS, SGT. RON CHAMBERS, BILL LAPPIN, ARNOLD BAYNARD, JEFF DOMINICK, JACK GREENBURG, RICHARD LAMB, FRANK AHLVERS, JOHN ADAMCZYK, AND TIM BROWN)

27. Plaintiffs incorporate by reference the allegations of paragraphs 1-26 of this complaint.

28. Defendants by means of threats, coercion and intimidation interfered with the constitutional rights of plaintiff IRIS MENA, by forcibly detaining and arresting her in violation of the California Constitution and the immunities secured by the Fourth, and Fourteenth Amendments to the United States Constitution, all to plaintiff's damages as hereinabove alleged.

FIFTH CLAIM FOR RELIEF

NEGLIGENCE

(PLAINTIFFS IRIS MENA AND JOSE E. MENA AGAINST DEFENDANTS CITY OF SIMI VALLEY, CHIEF OF POLICE RANDY G. ADAMS, POLICE OFFICERS DARIN L. MUEHLER, ROBERT BRILL, M. HODGES #309, R. JONES #305, MCCONNELL, V. ALLEGRA #320, A. MCCORD, LT. DICK THOMAS, SGT. RON CHAMBERS, BILL LAPPIN, ARNOLD BAYNARD, JEFF DOMINICK, JACK GREENBURG, RICHARD LAMB, FRANK AHLVERS, JOHN ADAMCZYK, AND TIM BROWN)

29. Plaintiffs replead each and every allegation contained in paragraphs 1 through 28, and by this reference, incorporate the same herein and make each a part hereof:

30. Defendants negligently and carelessly entered and searched plaintiffs' home and detained and arrested plaintiffs, causing the injuries complained of herein.

31. Defendants are liable for their negligent acts pursuant to Government Code § 820.

PRAYER

WHEREFORE, plaintiffs pray for judgment as follows:

(a) Compensatory general and special damages according to proof;

(b) Exemplary damages, against each of the individual defendants, according to proof, as to Claims for Relief 1-4;

(c) Reasonable attorney's fees and expenses of litigation, as to Claims for Relief 1-4;

(d) Costs of suit necessarily incurred herein; and,

(e) Such further relief as the court deems just or proper.

Dated: February 3, 1999

LAW OFFICES OF JAMES S. MULLER

By /s/ James S. Muller
JAMES S. MULLER
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Feb. 22, 1999]

CASE NO.: CV 98-85 2 AHM (AIJx)

IRIS MENA and JOSE MENA,
Plaintiff,

vs.

CITY OF SIMI VALLEY, *et al.*,
Defendants.

ANSWER TO FIRST AMENDED COMPLAINT

Demand for Jury Trial

Comes now defendants CITY OF SIMI VALLEY, CHIEF ADAMS, and OFFICERS MUEHLER, BRILL, HODGES, JONES, McCONNELL, ALLEGRA and McCORD, THOMAS, CHAMBERS, LAPPIN, BAYNARD, DOMINICK, GREENBURG, LAMB, AHLVERS, ADAMCZYK, and BROWN, in answer to plaintiff's complaint admit, deny and allege as follows:

1. In answer to Paragraphs 3, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 28, 30, and 31 of the Complaint, defendants deny each and every allegation contained therein.

2. Answering Paragraphs 1, 2, 5, and 7 of the Complaint, defendants admit the allegations of the said paragraphs.

3. Answering Paragraph of 4, 6, and 9 the Complaint, defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said paragraph, and on that basis deny each and every allegation contained therein.

4. Answering Paragraphs 8, 22, 25, 27, and 29 of the Complaint, defendants incorporate the admissions and denials as set forth above.

5. Answering Paragraph 10 of the Complaint, defendants admit that a search warrant was obtained on or about January 29, 1998 for 1363 Patricia Street. Defendants deny the remaining allegations of said paragraph.

6. Defendants deny that by reason of any act or acts, fault, carelessness, omission or omissions on the part of these answering defendants, plaintiffs were injured or damaged in any sum whatsoever, whether as alleged in plaintiffs' complaint or otherwise or at all.

FIRST AFFIRMATIVE DEFENSE

7. That the plaintiffs' complaint fails to state a cause of action against these answering defendants for, pursuant to *Monell v. Department of Social Services of the City of New York* (1978) 56 L.Ed. 2d 611, there can be no recovery for a federal civil rights violation where there is no constitutional deprivation occurring pursuant to governmental custom.

SECOND AFFIRMATIVE DEFENSE

8. That pursuant to *Anderson v. Crieghton* (1987) 483 US 635, there can be no recovery for a federal civil rights violation where these defendants objectively acted in good faith and where a reasonable officer with like training and experience would have believed the complained of conduct to have been lawful. (*Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994)).

THIRD AFFIRMATIVE DEFENSE

9. That plaintiffs' complaint does not state facts sufficient to constitute a cause of action against these defendants because, pursuant to *Parratt v. Taylor* (1981) 451

U.S. 527 and *Daniels v. Williams* (1986) 474 U.S. 327, simple negligence is not a Federal Civil Rights violation.

FOURTH AFFIRMATIVE DEFENSE

10. Defendants are informed and believe and upon such information and belief allege that plaintiffs were careless and negligent in and about the matters alleged in their complaint and that said carelessness and negligence proximately contributed to the loss and damages complained of, if any there were, and the damages, if any, recoverable by said plaintiffs shall be and must be diminished in proportion to the amount of fault attributable to said plaintiffs.

FIFTH AFFIRMATIVE DEFENSE

11. Defendants are informed and believe and upon such information and belief allege that third parties were careless and negligent in and about the matters alleged in plaintiffs' complaint, and that said carelessness and negligence proximately contributed to the loss and damages complained of, if any there were, and the damages, if any, recoverable by said plaintiffs shall be and must be diminished in proportion to the amount of fault attributable to said third parties.

SIXTH AFFIRMATIVE DEFENSE

12. That a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him whether or not such discretion be abused. *Government Code* § 820.2.

SEVENTH AFFIRMATIVE DEFENSE

13. That, should there be an act or omission by these answering defendants, it occurred in the exercise of due care and the execution of the enforcement of the law and there is no liability resulting therefrom. *Government Code* § 820.4.

EIGHTH AFFIRMATIVE DEFENSE

14. That a public employee is not liable for an injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment even if he acts maliciously and without probable cause. *Government Code* § 821.6.

NINTH AFFIRMATIVE DEFENSE

15. That any detention and/or arrest of plaintiffs was reasonable, lawful and proper pursuant to *Penal Code* § 849.

TENTH AFFIRMATIVE DEFENSE

16. That any detention and/or arrest of plaintiffs was made with reasonable suspicion and/or probable cause to believe said plaintiffs committed a public offense and no civil liability shall arise pursuant to *Penal Code* §§ 836, 836.5 and 847.

ELEVENTH AFFIRMATIVE DEFENSE

17. That, if force was used to detain and/or effect an arrest of plaintiffs, the use of such force was privileged pursuant to *Penal Code* §§ 834, 843(a), 835, 835(a) and 847.

TWELFTH AFFIRMATIVE DEFENSE

18. That plaintiffs' conduct amounted to an assumption of the risk that they would be detained and/or arrested and that reasonable force would be used to affect such arrest if plaintiffs resisted.

THIRTEENTH AFFIRMATIVE DEFENSE

19. That insufficient facts have been stated to constitute a cause of action for punitive damages.

FOURTEENTH AFFIRMATIVE DEFENSE

20. That plaintiffs' action was not brought in good faith and is frivolous and by reason of these premises defendants are entitled to and will seek reasonable expenses, including attorneys fees, in defending this action.

FIFTEENTH AFFIRMATIVE DEFENSE

21. That at all times herein mentioned, defendants acted in good faith, without malice, and within the scope of their duties as peace officers of the City of Simi Valley.

SIXTEENTH AFFIRMATIVE DEFENSE

22. That neither a public entity nor a public employee is liable for an injury caused by the act or omission of another person (*Government Code* § 820.8).

SEVENTEENTH AFFIRMATIVE DEFENSE

30. That plaintiffs' claims, and each of them, are barred by the doctrine of unclean hands.

EIGHTEENTH AFFIRMATIVE DEFENSE

23. The complaint and each and every paragraph thereof fails to state facts sufficient to constitute a cause of action against these answering defendants.

NINETEENTH AFFIRMATIVE DEFENSE

24. That, except as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or public employee or any other person. *Government Code* § 815(a).

TWENTIETH AFFIRMATIVE DEFENSE

25. That, except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission from any employee of the public entity where the employee is immune from liability. *Government Code* § 815.2(b).

WHEREFORE, these answering defendants pray that the plaintiffs take nothing by reason of their complaint on file herein, and that these answering defendants be awarded costs of suit, attorneys fees, and such other and further relief as the Court deems just and proper.

DATED: February 19, 1999

CARRINGTON & NYE

By /s/ David L. Nye
DAVID L. NYE
Attorneys for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Jan. 30, 2001]

CASE NO.: CV 98-8512 AHM (AIJx)

IRIS MENA AND JOSE MENA,
Plaintiff,

vs.

CITY OF SIMI VALLEY, *et al.*,
Defendants.

PARTIAL JUDGMENT [FRCP 54(b)]

Defendants' motion for summary judgment or, in the alternative, summary adjudication of claims came on for hearing before this Court on August 9, 1999, before the Honorable A. Howard Matz, District Judge Presiding. The evidence having been fully considered, the issues having been duly heard, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. The motion for summary judgment of Defendant McConnell having been granted, plaintiffs will take nothing as against Defendant McConnell, the action against Defendant McConnell is hereby dismissed on the merits and Defendant McConnell is entitled to recovery of recoverable costs; and

2. The District Court's denial of defendants' joint motion for summary adjudication of plaintiffs' claim under 42 U.S.C. § 1983 that the search warrant was overbroad under the Fourth Amendment to the United States Constitution having been reversed by the Ninth Circuit Court of

Appeals and remanded for entry of judgment for defendants on this claim, plaintiffs will take nothing as against defendants on this claim and this claim against defendants is hereby dismissed on the merits.

IT IS SO ORDERED:

Dated January 30, 2001

/s/ A. Howard Matz
THE HON. A. HOWARD MATZ
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed May 3, 2001]

CASE NO.: CV 98-8512 AHM (AIJx)

IRIS MENA and JOSE MENA,
Plaintiff,

vs.

CITY OF SIMI VALLEY, *et al.*,
Defendants.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

* * * *

INSTRUCTION NUMBER____

QUALIFIED IMMUNITY AFFIRMATIVE DEFENSE—
ELEMENTS AND BURDEN OF PROOF

In addition to denying plaintiffs' claim, each of the defendant officers has asserted a complete affirmative defense to plaintiffs' claim. This affirmative defense shields a police officer from liability for unlawful conduct performed as part of his duties as a police officer if a reasonable officer in the defendant's position could reasonably have believed at the time that he acted that his actions were lawful.

In order to prevail on this claim, each of the defendant officers has the burden of proving each of the following elements by a preponderance of the evidence:

1. that a reasonable officer in the defendant's position could reasonably have believed at the time that he acted that his actions were lawful.

If you find that the defendant has proven this element by a preponderance of the evidence then you should find for the defendant and against the plaintiff.

If, on the other hand, you find that: 1) the plaintiff has proven each of the elements of his or her claim against the defendant by a preponderance of the evidence; and 2) the defendant has failed to prove the element of his affirmative defense by a preponderance of the evidence, then you should find for the plaintiff and against the defendant.

AUTHORITY FOR INSTRUCTION NUMBER ____

9th Cir.Civ. Jury Instr., Nos. 5.5, 11.1.0 (modified); *Ortega v. O'Connor*, 146 F.3d 1149, 1155 (9th Cir. 1998).

TO BE GIVEN ___

REFUSED ___

GIVEN AS MODIFIED

AGREED UPON ___

* * * *

INSTRUCTION NUMBER ____

LAWFUL DETENTION DEFINED

Under the Fourth Amendment, a police officer may lawfully detain the occupants of a residence during the execution of a valid search warrant. This authority permits the officers to take actions to minimize the risk of harm engendered from the search, such as displaying force, seizing the occupants, and conducting pat down searches for weapons.

While the detention of an occupant during the period of a search does not generally constitute a violation of the right to be free from unreasonable searches under the Fourth Amendment to the United States Constitution, a detention in connection with a search may be unreasonable if the detention is

unnecessarily painful, degrading, prolonged, or if it involves an undue invasion of privacy.

AUTHORITY FOR INSTRUCTION NUMBER ____

Michigan V. Summers, 452 U.S. 692, 705 (1981); *Murdock v. Stout*, 54 F.3d 1437, 1442 (9th Cir. 1995); *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994); *Liston v. County of Riverside*, 120 F.3d 965, 977-979 (9th. Cir. 1997).

Submitted by defendant

TO BE GIVEN ___

REFUSED ___

GIVEN AS MODIFIED ___

AGREED UPON ___

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed June 1, 2001]

CASE NO.: CV 98-8512 AHM (AIJx)

IRIS MENA AND JOSE MENA,
Plaintiff,

vs.

CITY OF SIMI VALLEY, *et al.*,
Defendants.

DEFENDANTS' PROPOSED VERDICT FORM

Defendants submit the following proposed verdict form which has been modified from the one previously submitted to conform to the new (latest) list of defendants.

Dated: May 31, 2001

CARRINGTON & NYE

/s/ David L. Nye
DAVID L. NYE
Attorney for Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 98-8512 AHM

IRIS MENA and JOSE E. MENA,
Plaintiff,

v.

CITY OF SIMI VALLEY *et al.*,
Defendants.

SPECIAL VERDICT
(FIRST PHASE)

We, the jury in the above-entitled action, based on the evidence presented and on the instructions given to us by the Court, now reach our verdict on the issues submitted to us.

QUESTION NO. 1: *(Civil Rights violation pertaining to execution of the search warrant as to plaintiff Iris Mena)* Do you find that any of defendant officers violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search by the unlawful execution of the search warrant at 1363 Patricia Avenue?

	Yes	No
Darin Muehler	___	___
Robert Brill	___	___
Vincent Allegra	___	___
William Lappin	___	___

Please proceed on to the next question

QUESTION NO. 2: *(Civil Rights violation pertaining to execution of the search warrant as to plaintiff Jose Mena)* Do you find that any of the defendant officers violated plaintiff Jose Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search by the unlawful execution of the search warrant at 1363 Patricia Avenue?

	Yes	No
Darin Muehler	___	___
Robert Brill	___	___
Vincent Allegra	___	___
William Lappin	___	___

If you answered Question No. 1 or Question No. 2 "Yes" as to any defendant officer, please proceed to Question No. 3. If you answered Question No. 1 and Question No. 2 "No" as to all defendant officers, proceed to Question No. 4.

QUESTION NO. 3: *(Qualified Immunity)* For each defendant officer to which you answered "Yes" in Question No. 1 or 2, do you find that a reasonable officer in that officer's position could reasonably have believed at the time he acted that his actions were lawful?

	Yes	No
Darin Muehler	___	___
Robert Brill	___	___
Vincent Allegra	___	___
William Lappin	___	___

Please proceed in to the next question

QUESTION NO. 4: *(Civil Rights violation pertaining to detention of Iris Mena)* Do you find that any of the individually named defendant officers violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by detaining her in an unlawful manner?

	Yes	No
Darin Muehler	___	___
Robert Brill	___	___
Vincent Allegra	___	___
William Lappin	___	___

If you answered Question No. 4 "Yes" as to any defendant officer, please proceed to Question No. 5. If you answered Question No. 4 "No" as to all defendant officers, proceed to the directions following Question No. 5.

QUESTION NO. 5: *(Qualified Immunity)* For each defendant officer to which you answered "Yes" in Question No. 4, do you find that a reasonable officer in that officer's position could reasonably have believed at the time he acted that his actions were lawful?

	Yes	No
Darin Muehler	___	___
Robert Brill	___	___
Vincent Allegra	___	___
William Lappin	___	___

If you answered "No" to Question No. 1, Question No. 2, and Question No. 4, as to all officers, please sign and return this verdict form to the court.

If you answered "Yes" as to any defendant officer(s) in response to Question No. 1, Question No. 2 or Question No. 4, but also answered "Yes" as to that same defendant officer(s) in response to Question No. 3 or Question No. 5, please sign and return this verdict form to the court.

If you answered "Yes" as to any officer in either Question No. 1, Question No. 2, or Question No. 4, but answered "No" as to that same defendant officer(s) in response to Question No. 3 or Question No. 5, please answer Question No. 6.

QUESTION NO. 6: State the total amount of damages, if any, that you award each plaintiff for each of his or her claims. Please note that under the Court's instruction, if you have found that plaintiff suffered no actual damage, you must award him or her nominal damages in an amount not to exceed One Dollar ($1.00).

Cause of Action	Amount Awarded
1. Civil Rights Violation—search warrant execution	
Iris Mena	$_____
Jose Mena	$_____
2. Civil Rights Violation detention of Iris Mena	$_____

Please sign and return this verdict form to the Court.

DATED: _____

_____

Foreperson

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 98-8512-AHM

IRIS MENA, *et al.*,
Plaintiffs,

-v-

CITY OF SIMI VALLEY, *et al.*,
Defendants.

THE HONORABLE A. HOWARD MATZ,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
TUESDAY, JUNE 12, 2001

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

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[3] INDEX TO WITNESSES

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
William Lappin				
By Mr. Muller	99			
By Mr. Muller		132		

* * * *

[95] [THE COURT:] give each of you your own copy of Court Exhibit 1. And because it's the necessary way for me to do it, I'm going to read into the record the facts that are written down on this court exhibit. It's not a plaintiff's exhibit and it's not a defendant's exhibit. It's an exhibit that I caused to be marked. These are facts which you are instructed and I am now instructing you to accept as proven. Whichever way they cut and whichever side wants to rely on them and in some respects maybe both sides will, they are deemed to be proven. So there's not an issue as to what these facts are.

Some of the evidence that you hear may relate very directly to these facts and may explain additional information about these facts or how they came to happen or why. But the facts are now established as proved. Here's what those facts are.

A. At all times relevant to this action, Darin Muehler and Robert Brill were employed as police officers by the Simi Valley police department—that will be known as SVPD—and they were assigned to the gang unit of the special problem section of the department.

B. On January 13th, 1998, Officers Muehler and Brill responded to a gang-related drive-by shooting in Simi Valley involving two rival gangs and were assigned as the investigating officers for the shooting.

C. During the course of their investigation, Officers [96] Muehler and Brill obtained information that the primary suspect in the shooting was Raymond Romero, a known West Side Locals gang member. The officers learned that Romero was in possession of a .25 caliber handgun used in the shooting along with ammunition for that gun and for a .22 caliber handgun.

D. The officers learned that Raymond Romero was living in what was termed a poor house at 1363 Patricia Avenue and that another known West Side Locals gang member, Janero Gonzales, Jr., also had lived at that address. A poor house

was described to the officers as a residence where a large number of people resided in a house designed for one family. The officers were also told there were people residing in campers in the rear yard.

E. The officers interviewed Raymond Romero's mother and brother who confirmed that he lived at the Patricia Avenue address and that he also stayed at his mother's house at 2646 Cimmaron Avenue in Simi Valley.

F. On January 29th, 1998, Officer Muehler sought and obtained a search warrant for Raymond Romero's known addresses, 1363 Patricia Avenue and 2646 Cimmaron Avenue.

G. The search warrant was a valid search warrant.

H. On February 3rd, 1998, members of the Simi Valley police department conducted a simultaneous service and execution of the search warrant on the two locations listed in the warrant.

[97] I. Plaintiff Jose Mena was the owner of the home at 1363 Patricia Avenue. He was not present at the house during the service and execution of the search warrant on February 3rd, 1998.

J. Plaintiff Iris Mena, the adult daughter of Jose Mena, was a resident of 1363 Patricia Avenue and was present at that residence at all times during the warrant service and execution on February 3rd, 1998.

K. Three other tenants who rented and lived in a mother home and two vans in the back yard of the residence were also present during the warrant service and execution.

L. The warrant service and execution began at approximately 7:00 o'clock a.m. It was raining. Sometimes quite heavily throughout the completion of the execution. The six-person special weapons and tactics team headed by Detective William Lappin made the initial entry into the house. Once

the house was secured, the SWAT team left and Officer Muehler directed the search of the house.

M. Officers arrested Raymond Romero for possession of a small quantity of marijuana at the 2646 Cimmaron Avenue address on the date the search warrant was issued. What was served. They issued him a citation and they released him at the scene.

N. The actual cash value of the damage done to the interior of the residence at 1363 Patricia Avenue during the

* * * *

[114] go to work.

THE COURT: We know that members of this jury won't be asleep at 7:00 o'clock.

(LAUGHTER)

BY MR. MULLER:

Q. But you understood when you were there at the front door that some people are sleeping at 7:00.

A. I absolutely had no idea. I didn't make a judgment one way or the other then. That thought did not enter my mind at the front door.

Q. What happened after you decided to order the entry into the house?

A. A ram was used on the door and forced. The door went open with I believe one strike of the ram forcing the front door open. One pair of officers entered and turned to the left holding on the kitchen area. Myself and another officer entered turning to the right towards the first bedroom inside the door. And the second pair went straight through towards the rear hallway.

Q. So on that initial entry with just one strike with the ram, there wasn't a lot of noise on the initial entry; is that right?

A. It was one strike but that's a lot of noise.

Q. There wasn't pounding though repeatedly with the ram to get in.

[115] A. No.

Q. All right. What did you do once you got into the home?

A. Once I was inside the residence, I had to turn to my right to enter a bedroom that was immediately inside the front door off to the right. And myself and another officer entered that bedroom.

Q. All right. And what did you see when you got into that bedroom?

A. We entered that bedroom and there was a bed off to our, slightly to the left towards the east wall and it appeared that somebody was in the bed. There were things stacked on the far right wall by the window. Things stacked on the west wall. And at that time we were announcing ourselves and speaking to the subject we saw in the bed.

Q. And you determined at some point in time that that was a female in the bed?

A. Yes.

Q. Now, when you first came in, did this person appear to be sleep?

A. It was hard to say. I don't remember if I saw her eyes open or if they were open when I came in. I can't remember.

Q. All right. You remember that you had your deposition taken back on January 1st, 1999?

A. Yes.

Q. And we discussed that whether the person was asleep or [116] not?

A. We may have. I've recently reviewed it. Yes, we did.

Q. And isn't it true that you believed that the person was asleep when you first came into that bedroom, the female?

A. If that's what I said two years ago, that's what I believed two years ago.

Q. And your memory was much better of this incident two years ago than it is today.

A. Probably.

Q. And back in your, when you gave your deposition, you understood that that deposition was under oath.

A. Yes.

Q. And you understood that that deposition testimony you gave could be used at this trial here.

A. Yes.

Q. So isn't it true that when you first entered that bedroom, you saw someone asleep in bed?

MR. NYE: Objection; it's been asked and answered, Your Honor.

THE COURT: Overruled.

THE WITNESS: I believe I saw somebody in that bed that was possibly asleep. I believed at that time may have been asleep.

BY MR. MULLER:

Q. And that's because when you came in that person had the [117] appearance of someone just woken up. They got up and kind of looked around startled?

A. Yes.

Q. What did you do after you saw this person who appeared to be asleep look up at you startled?

A. As I said, we were identifying ourselves when we entered the room stating who we were. We ordered her to roll over in the bed. And I can't remember if she rolled over on her own volition or whether we rolled her over. Once we rolled her over, we put handcuffs on her.

Q. And when you first entered, you were pointing your MP-5 machine gun at her?

A. Yes.

Q. Who entered with you; it was two people, right?

A. Yes.

Q. Who entered with you?

A. That was Officer Dominick.

Q. And did he also have an MP-5 machine gun?

A. I believe he did.

Q. And was he also pointing his gun at that person in the bed?

A. Yes.

Q. And can you explain to the jury what kind of outfit you wear when you're doing a SWAT warrant service.

THE COURT: Just reframe the question. I will ask the [118] question. Tell us what you were wearing then on that occasion on that morning in that room, please.

THE WITNESS: We were wearing green police uniforms which are basically a utility, uniform, military type of utility tilt covered with an entry vest which is black, a ballistic vest. On the left-hand side of the pocket, above the pocket we have a badge and we also have the word police on the vest on the front. We were wearing baloclavas which are things that conceal the features of our face, helmets and goggles, and carrying MP-5 submachine guns.

BY MR. MULLER:

Q. All right. What did you do after you possibly rolled this woman over and put handcuffs on her?

A. We checked the room for any other occupants and then I left the room.

Q. Now, the woman that you rolled over or possibly rolled over and put handcuffs on, that was Iris Mena; is that right?

A. That's what I have been told.

Q. You learned that since the search.

A. Yes.

Q. And when you went into the room, did Ms. Mena present any threat to you in any way, did she do anything threatening rather?

A. At that time, no.

Q. And did she completely cooperate with you?

[119] A. As far my memory goes, I believe she did. I don't believe any force was necessary. We didn't use any force on her.

Q. Other than rolling her over possibly?

A. Yes.

Q. And the point you had her rolled over you had her face down on her bed?

A. Yes.

Q. After you checked for other suspects, what did you do with Iris Mena?

A. Left her right there on the bed.

Q. And why did you leave her on the bed?

A. I left Officer Dominick in the room at the door when I left the room. And the easiest place to keep her secured and know where she was at was there where she was at.

Q. Now, how did you get into Iris Mena's room?

A. Through the bedroom door.

Q. And how were you able to get in through the bedroom door?

A. I don't remember if we forced that door or not. I know that the door was closed and we went through it.

Q. And by "we," who do you mean?

A. Myself and Officer Dominick.

Q. So you don't remember whether or not you broke open that door?

A. I don't remember that.

* * * *

[132] as they could to store their things.

A. I suppose, yes.

Q. Well, that's what it appeared at least. And what about the overall condition of the house, did you consider the house messy?

A. The house was basically the same. It was cluttered in places, sparsely furnished but it wasn't messy, what I considered a mess.

MR. MULLER: I don't have any further questions.

THE COURT: Okay. Go ahead.

CROSS-EXAMINATION

BY MR. NYE:

Q. Good afternoon, Detective Lappin. How are you?

A. Good afternoon. I'm fine.

Q. Good. Detective, how long were you in the residence at 1363 Patricia from the time that you entered to the time that you left?

A. About five minutes.

Q. And your function there was to do what?

A. To monitor the entry team entering the residence and direct their movements.

Q. And the entry team's function was to do what?

A. To clear the residence searching for anybody that might be in there to pose a threat to a search team.

Q. All right. And can you explain to the jury what you mean [133] when you say "clear a residence."

A. Basically our responsibility at that time was to make sure that every place that a person could be concealed or might conceal themselves in some manner was cleared to make sure there were no people there so that a search team could come in safely and conduct their search for evidence.

Q. And why is a SWAT team used to clear a residence such as this?

A. The reason a SWAT team would be used on this residence or that we were used was the high probability that a subject that was a member of a gang and involved in two attempt murders and maybe gang associates in the residence with him were there and possibly armed, that this was a situation that would require action that would basically put down any possible resistance and therefore ensure the safety of the police and the subjects in the residence.

Q. Did you consider this entry into this particular residence to be a high risk entry?

A. Yes.

Q. Why was that?

A. Because of the information we received before the service of the search warrant.

Q. And what information was that?

A. That the search was, the search warrant had been issued and was being conducted because the subject they were looking [134] for was a suspect in attempted murder, was armed. They believed that this subject would be at that residence, that There was a high number of people that would be there with him and other gang associates would be among those people.

Q. All right. Let me go back and talk a little bit about your background and history with the department. You said you were with the department for 15 years?

A. Yes.

Q. And before that, what did you do?

A. I was in the Marine Corps.

Q. And what is your current assignment with the department at this time?

A. Narcotics detective.

Q. Now, if I understand it correctly, the SWAT team is broken down into two sub teams; is that correct?

A. Yes.

Q. And what are those designations?

A. Blue and gold.

Q. And which SWAT team was used for this particular entry on this particular day?

A. The blue team.

Q. And who made the decision to use just one SWAT team as opposed to using the entire SWAT team?

A. That decision is made by the team commander.

MR. NYE: Your Honor, at this—

* * * *

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 98-8512-AHM

IRIS MENA, *et al.*,
Plaintiffs,

-v-

CITY OF SIMI VALLEY, *et al.*,
Defendants.

THE HONORABLE A. HOWARD MATZ,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
WEDNESDAY, JUNE 13, 2001

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

[3] INDEX TO WITNESSES

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[4] THE COURT: Good morning.

(JURY PRESENT)

THE COURT: Welcome back, ladies and gentlemen. We're about to resume.

WILLIAM LAPPIN, RESUMED

THE COURT: Let me remind you that you previously were sworn and you have the obligation to testify truthfully. Do you understand that?

THE WITNESS: Yes, Your Honor.

THE COURT: You may proceed.

MR. NYE: Thank you, Your Honor.

CROSS-EXAMINATION, CONTINUED

BY MR. NYE:

Q. Good morning, Detective Lappin.

A. Good morning.

Q. When we left off yesterday, we were just about to start using a diagram. Before we get to that, I'd like to ask you a few more questions. Are there certain conditions that have to be met before SWAT entry is utilized?

A. Yes.

Q. And what are those conditions generally?

A. Generally the conditions are that the situation is going to involve more hazards than are likely to be handled in a usual [5] manner by patrol. You have subjects in a residence that are armed and dangerous. You know there's a possibility of weapons in the residence. You know there's a possibility of encountering possibly multiple suspects resisting violently.

Q. And based upon the information that was available to you before this particular entry at 1363 Patricia Avenue, were those conditions met?

A. Yes.

Q. Can you tell the jury, please, what was done in preparation for this entry.

A. As stated before, I met with Officer Muehler and Officer Brill and over a period of a week and a half to two weeks we met on a daily basis looking at photographs and diagrams that we produced of the residence. Detective Muehler at that time advised me of what the crime was that had occurred, what they were investigating. I then got with the SWAT team and prior to service of the warrant we went out to a parking lot behind the station and basically taped out a diagram of the residence on the parking lot and practiced our entries and movement through that diagram.

Q. And this tape-out, was that done according to the diagram that was prepared by Officer Muehler and Officer Brill?

A. Yes.

Q. And did that diagram prove to be accurate once you were inside the house?

* * * *

[47] before the search you were out there with Officer Muehler and Officer Allegra, correct?

A. Officer Allegra and I responded. We were the first two officers there. We got into a confrontation.

MR. MULLER: Move to strike after—

THE COURT: Okay.

MR. MULLER:—he responded.

THE COURT: That motion is granted. The reference to a confrontation is stricken. You may proceed.

BY MR. MULLER:

Q. Now, isn't it true that Officer Muehler also was out there four months before the search?

THE COURT: He told you he didn't know. You're belaboring the point.

MR. MULLER: Okay.

THE COURT: There's not an issue in the case about whether Muehler was there. So you don't have to waste time establishing that.

MR. MULLER: Thank you, Your Honor.

BY MR. MULLER:

Q. Now, you talked about a confrontation out at the house; is that right?

A. Yes.

Q. And were some of the people at the house unfriendly towards you?

[48] A. Very unfriendly.

Q. Also unfriendly towards Officer Allegra?

A. Yes.

Q. Did that anger you?

A. No. It was unpleasant but it didn't anger me.

Q. And when you were out at the house four months before, did you see anybody who met any of the criteria for gang membership?

A. Not that I recall.

Q. And you've been trained what the criteria are for gang membership, what to look for?

A. Yes.

Q. In fact, one of the people that you encountered was a middle-aged gentlemen?

A. Yes.

Q. And he didn't fit any of the criteria for gang membership.

A. Not that I recall.

Q. And there were several other people there, females, a couple of women and three or four men?

A. I believe so.

Q. And none of those people fit the criteria for gang membership.

A. Not that I recall.

MR. MULLER: I don't have any further questions.

* * * *

[50] Q. Okay. Do you have a background in speaking Spanish?

A. Yes.

Q. And tell us about that briefly.

A. I attended the U.S. Border Patrol Academy back in '88. Graduated that. I have attended several college classes and I have tested for college credits for Spanish.

Q. Do you speak Spanish fluently?

A. I don't think I do.

Q. Let's go back to this domestic violence call that Mr. Muller was talking to you about. That was about four or five months before you went to execute the warrant on Patricia Avenue?

A. Yes.

Q. And the nature of that call was what?

MR. MULLER: I'm going to object; Evidence Code 402 and also not relevant.

THE COURT: Overruled. But clarify the question of nature of the call. We're not going to go into extensive discussion about what happened or why. But I do think you have a right to establish how it happened when he got out there.

MR. NYE: Thank you, Your Honor.

BY MR. NYE:

Q. What was your, what assignment were you given with respect to that address four or five months ago?

A. I believe it was a 911 disconnect with a family dispute.

[51] Q. And did you respond to the call?

A. Yes.

Q. When you responded to the call, who were you met by?

A. A female. I believe it was out near the front door or just out on the front lawn I believe.

Q. And did she identify herself to you?

A. Yes.

Q. Who was she?

A. I don't recall her name. She said she was the wife of Mr. Mena.

Q. And did she explain to you what had transpired before you arrived?

MR. MULLER: Objection under 402, Your Honor.

THE COURT: Sustained.

BY MR. NYE:

Q. In addition to this lady who identified herself to you as the wife of Mr. Mena, were there other people present?

A. Yes.

Q. How many?

A. Maybe four others.

Q. Males and females?

A. I believe there might have been one more female there and at least three males.

Q. And where were these other people located? And you can refer to the diagram if that helps you.

[52] THE COURT: the diagram being Exhibit 61?

MR. NYE: Yes, Your Honor.

THE WITNESS: Three of them were sitting at a dining table or actually where it says dining room. There was a dining table there. They were all sitting around that table. And I believe Mr. Mena was somewhere in the living room maybe near the front door when I first contacted him.

BY MR. NYE:

Q. All right. Now, you said there was a confrontation that day?

A. Yes.

Q. And who was that confrontation with?

A. Mr. Mena and Officer Allegra had a confrontation with the other three.

Q. And what was the nature of your confrontation with Mr. Mena?

A. After I determined the facts of the spousal abuse, I was going to arrest Mr. Mena. I turned to him around and handcuffed him. He became resistive, kept spinning around, wouldn't comply. I finally had to force him onto the couch

which is where, I think where it says my name, Lamb and Ahlvers. There was couch there. I forced him onto the couch to handcuff him. As I was doing that, the another three males that were at the table started coming towards me and now Officer Allegra had to physically stand between us and them to keep them back.

* * * *

[83] the SWAT team that did the entry and cleared the house.

A. You mentioned chain of command. Are you speaking of hierarchy of actual responsibility of the supervisory level all the way down to the line officer?

Q. Sure.

A. Okay. We had Lieutenant Thomas is obviously the SWAT commander and he would have basically functional command over the entire operation. He also shares that role as the commanding officer of the special operations unit which is where the gang unit falls under. So he wears two hats really in that same incident.

Beneath him we had Sergeant Wilcox and Sergeant Chambers supervising the SWAT aspect of it.

Then when it gets down to the actual search, separate from the clearing of the house by the SWAT team, now once the clearing is done, now we have the actual search of the house. That's going to be done by the investigating officers of the case.

Q. You say that's going to be done. What you mean is that the investigating officer of the case is in charge of the search.

A. And that would in this case be Officer Muehler and myself would ultimately help orchestrate the search of the house.

Q. I'm not sure you responded directly. What I wanted to get out of you was Officer Muehler was the person in charge of [84] supervising the search.

A. Supervision may not be the best word. It's certainly overseeing. He did not have disciplinary responsibility or anything like that. That would still rest with the sergeant or above. But as far as orchestrating how the search was conducted, what should be searched next, those are all things that Officer Muehler or myself were to coordinate.

Q. Well, wasn't Officer Muehler the supervisor at the field level?

A. He's still an officer so I don't—our department does not have officers take the role of a supervisor. So maybe we're in a war of semantics. He wasn't technically a supervisor.

Q. Okay. But he was in charge of the search.

A. In a sense, yes. He and I were orchestrating that search.

Q. You and he made the decisions about where the search was conducting, what rooms were searched?

A. Correct.

Q. Now, part of the investigation connecting Romero with the Menas' home was a telephone call made to the Mena home, right?

A. That's part of it, yes.

Q. Okay. Explain to the jury what you did in regards to the phone call.

A. Well, we took the information from the Romero brother and mother regarding the color of the house, the location

* * * *

[88] Q. Did Anthony Romero describe Patricia Avenue—Anthony Romero didn't tell you that Raymond lived in a trailer or a camper, did he?

A. I don't think he said either way which portion of the property he lived in. If you'd like, I can refer to that report again. It's not in front of me now. Someone had changed the report here.

Q. The primary reason that SWAT was used on this warrant was because of Raymond Romero, correct?

A. The reason SWAT was used is that Ray Romero was suspected in being involved in a drive-by shooting. He was a gang member. He had exhibited a propensity for violence by discharging a handgun. The information that we had indicated he was a violent felon. The information we had is that another gang member may have lived there. Those were all things that went into our formulation of using the SWAT team for our safety.

Q. Would it be correct to say though that the primary reason that SWAT was used at Patricia Avenue was because of Raymond Romero?

A. Yes.

Q. Was there any surveillance done of Raymond Romero the day before the search warrant was served to see whether he was at Patricia Avenue or at his family home on Cimmaron Street?

A. I don't recall any specific surveillance the day before looking for Raymond Romero.

* * * *

[91] Q. 61A, is this what you're talking about, the rear of the garage that is in the upper right-hand corner of 61A?

A. Correct.

Q. And what were your duties in regards to this garage?

A. I was assigned with two other officers, it would have been Officer Adamzak and Officer Hodges, to make basically a simultaneous entry into that rear garage. Prior to making an entry, we were to give adequate knock and notice and our entry and knock and notice would be timed with the SWAT team. We were not to go in any earlier or any later but at the same time. And there are tactical reasons for that.

Q. Was the door to this garage in 61A, was that padlocked?

A. I don't recall it being padlocked now. I think it was just a lock.

Q. Did you try the knob?
A. Go ahead.
Q. I thought I cut you off.
A. You may have. What was your question?
Q. Did you try the knob on 61A?
A. I don't think we tried the knob prior to—we did our knock and notice but I don't think we tried the knob, no.
Q. So you just used the ram on 61A?
A. As I recall, we did, yes.
Q. And you caused damage to that door?
A. Yes.

* * * *

[94] THE WITNESS: Yes, sir.

THE COURT: All right. Ask the question again, please.

BY MR. MULLER:

Q. Okay. I'd just like you to give the jury an idea as to what did you in regards to the entry other than breaking into the unlocked door of that converted garage.

A. We provided knock and notice in English and Spanish and then we made our entry. And that was coordinated with the team in the front because I could hear the knock and notice start at the front.

Q. Okay. What did you do after the entry to that garage?
A. We waited in the garage.
Q. Why were you waiting in the garage?
A. The tactical plan was to include the SWAT team to clear out the interior of the residence. We were to wait in the garage until they gave a clear signal so we knew that it was safe to exit.
Q. What time did you all arrive at Patricia Avenue?
A. I think arrival was sometime between 6:30 and 7:00. I still can't recall exactly what time specifically.
Q. So between 6:30 and 7:00, not right at 7:00?

A. I don't recall it being any time but sometime in there. Our search warrant is authorized for 7:00 o'clock so it would have been sometime prior to 7:00 o'clock.
Q. Wasn't it your best estimate that you arrived between

* * * *

[96] Q. All right. Let me pull back a little bit. In regards to the search, what were your general duties?
A. My job was to recover evidence that was located during the searching process.
Q. Did you have any duties in regards to where the officers searched?
A. I think I helped assign officers to areas so we knew that those areas were covered.
Q. How many officers did you have searching the Mena home?
A. The interior, looking at the diagram, I think we had two, four, well, five or six maybe.
Q. At some point in time after SWAT cleared the home, did you do a walk-through?
A. Well, I'm sure we did. I don't remember exactly how that went. But yeah, I'm sure we walked through to see what basically was there.
Q. Was that before you made any assignments on the search?
A. Yes. Because I had to know what areas to assign.
Q. Now, someone was sent in to video tape before you did your search.
A. That's correct.
Q. That would be Rebecca McConnell.
A. That's correct?
Q. And she's not a police officer, right?
A. She's our crime scene investigator.
[97] Q. Do you know if she went in to video tape before or after you did the walk-through?
A. I don't know if it was before or after the walk-through. I just know she video taped before we searched.

Q. Okay. I would like to now go to Exhibit—

THE COURT: I'd like to ask a question.

MR. MULLER:—Exhibit 51.

THE COURT: Excuse me. I'd like to ask a question about your last answer. You said she videoed the premises before your search and you're not sure if it was before the walk-through; is that correct?

THE WITNESS: Correct.

THE COURT: What's the difference between the search and the walk-through?

THE WITNESS: As I understood his question on the walk-through is that once the SWAT team cleared it, we had now a house that we didn't have any other people and it didn't need to be searched. So that point between when the SWAT team actually stopped searching and the point that we started assigning, we walked through to determine what was there to be searched.

As an example, one of the middle bedrooms on the north side of the building didn't have any furniture in it so there was no need to assign someone to that room. So that would have been ascertained during the walk-through.

THE COURT: The walk-through was the first once-over.

* * * *

[105] you've drawn the distinction before about units and bedrooms. No, it did not strike me as being in contrast with our search warrant for the reasons that we outlined.

Q. I didn't ask you about the contents of your search warrant.

A. I understand.

Q. And we're still looking at Iris Mena's room. Do you see the doorway here, can you tell what that is?

A. It looks to be damaged, yes.

Q. Did you note that when you did your walk-through?

A. I don't know if—again, when you say "note," I don't think I took a physical note. But I think I was conscious of the damage that was done, yes.

Q. And right up here (indicating), does this appear to be a metal circle that one would put a padlock through?

A. You know, if you can roll the video tape, I will have a better idea. That could be. It's hard to tell from that.

Q. Okay.

THE COURT: Stop the video for a second. Please, both of you, don't talk when the other is talking. Don't interrupt his question. And you don't interrupt his answer. Now proceed.

BY MR. MULLER:

Q. Stopping on Iris Mena's room, in your whole investigation that led up to the search warrant service, you never developed one piece of evidence saying that Iris Mena was somehow related [106] to Mr. Romero's crime, did you?

A. That's correct, we did not.

Q. You didn't develop any information that Iris Mena was a gang member?

A. No, we did not.

Q. And certainly not her father?

A. Because I didn't know Iris Mena enough to know whether she had a significant roll in the investigation. But prior to this point, no.

Q. I'm not asking about what you did know I'm just asking you if you had any information at all that the Menas were related to Mr. Romero's crime in any way.

A. No.

Q. And did you have any information at all that the Menas were in Mr. Romero's gang?

A. I don't believe that they were, no. But I have no way of knowing that.

Q. Please. I'm just asking you if you had any information that any of the Menas were in Mr. Romero's gang.

A. I did not have information to that.

Q. All right. What are we looking at right here (indicating) ?

A. This looks like the vacant room.

Q. Now, do you know if that room was locked when SWAT made its entry?

* * * *

[116] Q. All right. Well, as you say, you may have, you may have told Hodges when you gave out the assignment that he was to search Ray Romero's room.

A. I may have. I just recall asking him to search that room. I don't recall specifically stating he's searching Romero's room at that point.

Q. Now, at some point, you would agree though that at some point soon after the search started, you identified that room positively as Romero's room.

A. Yes, at some point after the search started. Yes.

Q. At that point in time when you identified Romero's room soon after the search started, did you tell the searching officers not to search the other locked bedrooms?

A. No.

Q. Did you tell the officers not to continue their search through the unit occupied by the Menas?

A. No.

Q. At that time you had no information that the Menas were involved in the crime at all.

A. That's correct.

Q. And you had no information that the Menas had any gang associations or other criminal associations with Ray Romero.

A. I had no way of knowing that.

Q. You didn't know that.

A. I didn't know that.

* * * *

[119] mean, that's the best I can give you. I know it was sometime after they started searching. I don't recall specifically when he found the identification so I'm trying to give you the best ballpark I can. So it was sometime fairly quickly.

Q. It would be less than 20 minutes?

A. I'd say less than 30. More than 5, less than 30.

Q. And you would agree that this search took in the neighborhood of two hours?

A. An hour and 45 minutes, maybe two hours at the tops.

Q. Now, the search would have been shortened considerably if you had limited it to Raymond Romero's room and the common areas of the residence.

A. If we were only looking for things in his room, correct.

Q. I didn't say that. I said if you had limited the search to Raymond Romero's room and the common areas of the residence, it would have shortened the search considerably.

A. It would have shortened the search because there would have been less to search, yes.

Q. And you also assigned officers to search the trailers and mobile homes outside the property; is that right?

A. Correct.

Q. And you had them searching those homes, mobile homes and trailers after you had located Raymond Romero's room.

A. Well, simultaneous to. I think once the directions were given to people to search each room, it was done simultaneous.

* * * *

[121] Q. All right. After assigning the rooms, what was your duty or what did you do at the search location?

A. Once the room assignments were done, my job was to start recovering evidence.

Q. What did you do to recover the evidence?

A. I went from room to room and as people found them or they noted things that were significant, I made a determination to recover those items.

Q. All right. I would like to go back. Well, let me stop for a second. During the search, did you move around the property to supervise what the searching officers were doing?

A. I believe I did go from room to room at various points.

Q. Did you go out to the garage?

A. I maybe once or twice walked out there and walked back. But because my role is to recover evidence, there wasn't much evidence to recover in the garage. In fact, I don't think there was any. I don't think I spent much time out there.

Q. All right. I'd like to go back to the video. And we're now seeing the video that was taken after the search was done, correct?

A. Yes.

Q. And we're looking in Iris Mena's room?

A. Yes.

Q. The dresser there, that's the dresser that either you or your partner ordered broken into?

* * * *

[123] A. Correct.

Q. And very early on you were told about Ray Romero's I.D. being found in his room?

A. Yes.

Q. During the time that you were inventorying evidence, were you ever told that there was any evidence being found in the Mena room?

A. I don't think we found any evidence in the Mena room.

Q. Well, would you look at your inventory which is Exhibit 13 and refresh your recollection as to any evidence at all related to the crime as found in the Mena room.

THE COURT: Okay. Why are you asking him to look at 13?

MR. MULLER: To see if any evidence of the crime relating to or any evidence relating Ray Romero was found in the Menas' room.

THE COURT: Okay. Why don't you identify for the members of the jury what 13 is.

MR. MULLER: He's looking at it.

THE WITNESS: It does not look like any evidence was recovered from the Mena room.

BY MR. MULLER:

Q. Okay. And Exhibit 13 to backtrack, what is it?

A. This is our inventory of property taken during a search warrant.

* * * *

[126] Q. Well, was this video made after all the searching officers left?

A. There were people still present at 1363 Patricia when this was made. But I don't think any searching was done after it. In fact, I know no searching was done after the video was made. Although I don't know what clean-up was done after this video was made. For instance, she has the video camera sitting on top of the table there. I know that's the case that contains her video camera. She didn't just leave that behind.

Q. Okay.

A. So I don't know. I can't draw that conclusion.

Q. But the searching officers were gone when this video was made.

A. Like I said, I don't know who was present left at the facility. I can't say that they were gone like away from 1363 Patricia. They may have been completing whatever they were doing, that kind of thing, outside of the house. But there was no searching being done during this video and after this video.

Q. Okay. We're now looking at the breakfast nook leading to the kitchen and there's another pair of rubber gloves right there in the kitchen; is that correct?

A. It looks like it, yes.

Q. We're still in the kitchen here. Now, do you know if this—let me refer you to this closet here. Do you see a padlock on that door?

[127] A. It looks like there's a padlock there or some kind of a lock.

Q. And do you see that that's broken?

A. Yes.

Q. Did you anybody ask Iris Mena for the keys to that padlock before it was broken into?

A. I don't know. I'm not sure who broke that.

Q. That would have been one of the searching officers, correct?

A. Perhaps, yes.

Q. No one found anybody was hiding in a kitchen cupboard, did they?

A. No, there would not have been a SWAT clearing, correct.

Q. Did you have any concerns that that padlock was broken?

A. Well, I believe that the search warrant specified all locked containers. So that would be consistent with following the directions of the search warrant.

Q. And if you had keys, if someone gave you keys, you could have done that too, you could have opened that.

A. It's possible. But I know she didn't have the combination to one of the locks. I don't know if they had asked her that.

Q. Did you ask her about the keys?

A. I didn't ask her because, again, I don't know who had broken that so I don't know.

* * * *

[130] Q. That was the end of the search video. Let me back it up just to note the time. So this video was completed about 8:57 a.m., correct?

A. Yes, it looks like that was the time.

THE COURT: What exhibit number is the video?

MR. MULLER: It is 31—51, excuse me. 51.

BY MR. MULLER:

Q. You went out into the garage during the search several times, correct?

A. I don't know about several times. I was there a couple of times.

Q. Did you see Iris Mena out there in the garage?

A. I remember seeing people on the bed, sitting on the bed. At that point I didn't know who Iris Mena was so I—but like I said, I saw a female sitting on the bed.

Q. Did you see a young woman sitting on the bed?

A. The person who appears in court today, it looks like the video and that would be the person I saw.

Q. And you saw that she was completely cooperative, didn't you?

A. Yes.

Q. She wasn't causing any problems at all?

A. She didn't appear to be, no.

Q. And each time you went out in the garage, you saw that she was completely cooperative.

[131] A. I don't remember anything other than cooperative, yes.

Q. And each time you saw her, she had her hands handcuffed behind her back.

A. I believe so, yes.

Q. And you had the authority as the investigating officer, one of the investigating officers, to have Ms. Mena released; isn't that right?

A. Released from the scene or just released from the handcuffs?

Q. Well, let's start with the handcuffs. As the investigating—

A. I could have made both those decisions, yes.

Q. All right. So you could have had the handcuffs taken off her and you could have allowed her to leave the scene.

A. Correct.

Q. And you never did so.

A. Not until we finished our search, correct.

Q. So you left her for the entire time sitting handcuffed on that bed.

A. Correct.

Q. Now I want to refer you to Exhibit 12—I'm sorry. I want to refer you to Exhibit 11, Page 5. Are you there?

A. Yes.

Q. And does Exhibit 11 discuss what's supposed to be done with people who are found at the residence?

[132] A. It notes additional information. Let's see. Yes, it does.

Q. What does it state?

A. Any subjects encountered will be handcuffed and detained, until they can be patted down, their location noted, FI and released by Officer Muehler or Officer Brill.

Q. I'm also going to put up 11A which is a blowup.

THE COURT: What page was that from Exhibit 11?

MR. MULLER: That was page—

THE WITNESS: 5. It was Page 5.

BY MR. MULLER:

Q. So this was a tactical plan of how the search was supposed to go. It was prepared by Officer Muehler.

A. That's one page of it, yes.

Q. That's one page of it. And you had input into this plan.

A. Yes. I had some input, yes.

Q. You knew what was in the plan.

A. Correct.

Q. And it says that any subjects, any people in the house encountered will be handcuffed and detained.

A. Correct.

Q. And they would be patted down, correct?

A. Yes.

Q. And patting down someone is something you do almost immediately after handcuffing them or soon after handcuffing [133] them?

A. Yes.

Q. You want to make sure they're not armed?

A. Correct.

Q. Their location noted, that could be done very easily. That would be what bedroom—in the case of Iris Mena, it would be what bedroom she came from?

A. Correct.

Q. FI, now what is FI?

A. Complete a field identification card.

Q. And what is a field identification card?

A. I think it was—it's a card fire departments, about a three-by-five card. On one side it contains their name and information basically consistent with what a driver's license contains. On the backside it may have clothing, where they were born, basic information about the individual.

Q. So all this should take about two, three, five minutes?

A. Completing the information on the card, correct, it take very long.

Q. I'm talking about the patting down, their location noted and the FI card completed.

A. That would go very quickly, yes.

Q. About three to five minutes?

A. Yes.

Q. Now, this plan wasn't followed though, was it, in terms [134] of Iris Mena?

A. I disagree with that statement.

Q. Well, she was held handcuffed for approximately two hours, two to three hours, wasn't she?

A. Yes, she was.

Q. So the plan wasn't followed, was it?

A. The way I read the plan and I read it today is that at some point they will be released. It doesn't state in the plan when they will be released.

Q. Well, according to the plan, all that was needed to be done with the subject or the person that was found in the residence was to pat them down, note their location and do a field interview; is that right?

A. That was mentioned in the plan, yes.

Q. There was an officer who was stationed in the garage with Iris Mena for the whole two to three hours that she was sitting there handcuffed.

A. Two to three hours?

Q. Two to three hours.

A. I don't think she was handcuffed close to three hours at all. I think it was at most two hours.

Q. Okay. So you're saying two hours. For the two hours that she was handcuffed, there was an officer stationed with her in the garage.

A. The entire time she was handcuffed, yes.

[135] Q. And that officer could have at any time completed a field identification card of Iris Mena.

A. Correct.

Q Now, even if you didn't want to release Iris Mena pursuant to your plan, you could have taken her handcuffs off, right?

A. That argument could be made but I chose not to.

Q. And you made that decision despite the fact that she was completely cooperative and did not exhibit any hostile tendencies or hostile behavior towards you.

A. Correct.

Q. And referring to the field identification card that was supposed to be filled out, no one even bothered to do a field identification card of Iris Mena, did they?

A. I was under the impression one was done.

Q. Have you ever seen a field identification card relating to Iris Mena?

A. I understand in preparing for testimony today that one apparently never got inputted in the computer and none was found in records. But my impression at the scene was that one was done.

THE COURT: You know, I thought the question was in plain English. Have you ever seen. Now, it seems to me if that was the question, you could say yes, no or I don't know. You ask the question again. Okay? And you respond to the question [136] as framed.

THE WITNESS: Yes, Your Honor.

THE COURT: You're allowed to give speeches when I and your lawyer elicit additional information.

BY MR. MULLER:

Q. Have you ever seen a field identification card regarding Iris Mena?

A. No.

Q. How long after the search was completed was it until Iris Mena was released?

A. I would say very soon after the search was completed.

Q. But not immediately after the search was completed, right?

A. I don't see any reason why we would have kept her longer than the search being completed.

Q. Well, did you keep her about 10 to 15 minutes after the search was done?

A. It's possible. I don't recall.

Q. You kept her until after the video was made, correct?
A. I believe so.
Q. And when I talk about the video, I'm talking about the second video that was done at 8:50.
A. Correct.
Q. Well, ended at 8:57.

And isn't it your memory that about 10 to 15 minutes [137] after that Iris Mena was released?

A. That would sound consistent.
Q. And at any time did you ask Iris Mena any questions about the crime that Ray Romero was accused of?
A. I don't believe so.
Q. Do you know if anybody did?
A. I don't know.
Q. You were one of the investigating officers. Isn't that something you would know?
A. I don't think anybody did. But I don't know for sure if anyone did.
Q. You don't think anybody did.
A. No. I said I don't think anybody did.
Q. And that was because Iris Mena was not a suspect at all in this crime, correct?
A. That's correct.
Q. And there was no belief that Iris Mena had any relation to Ray Romero other than the fact that he rented a room in her father's house; is that right?
A. I don't know what her full relationship was.
Q. That's what I'm saying, you didn't have any evidence that the relationship between Iris Mena and Ray Romero was anything other than the fact that he rented a room from her father.
A. That's correct.

MR. MULLER: One second, Your Honor. I think I'm done.

[138] BY MR. MULLER:

Q. Did you ever explain to Iris Mena why you were there?
A. I believe my partner did at some point. I don't think I did.
Q. And you went out to the garage several times.
A. Correct.
Q. Did you ever show Iris Mena a search warrant when you went out to the garage?
A. I don't think at that point I did.
Q. Did you care if she knew why she was dragged out of her bed at gunpoint, handcuffed and taken to this garage for over two hours?
A. Yes, I did care about that.
Q. Well, did you want to explain to her why you were doing it?
A. I think we did explain that to her at some point.
Q. But not until the search was completely over.
A. That's correct.

MR. MULLER: I have no further questions.

THE COURT: Okay. You may proceed.

MR. NYE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. NYE.

Q. Good morning.
A. Good morning.

* * * *

[147] house prior.
Q. That would have been the house at 1363 Patricia?
A. Correct.
Q. We'll come back to that in just a moment.

You had information provided to you that a Janero Gonzales also resided at 1363 Patricia at some point in time?

A. Yes.

MR. MULLER: Objection; leading.

THE COURT: Overruled. He's just laying a foundation.

MR. NYE: That's correct.

BY MR. NYE:

Q. And what specific information did you have in that regard?

A. From his family that Janero Gonzales had lived there.

Q. All right. And am I correct that you did not know whether he did or did not reside there in February of 1998?

A. Correct.

Q. Was that information of any significance to you?

A. Yes.

Q. What was that?

A. Well, the fact that we may encounter two gang members at the house furthered our concerns that this was a high risk search warrant.

Q. Now, you had been to 1363 Patricia Avenue on prior occasions, correct?

[148] A. Yes.

Q. How many times?

A. I believe it was two.

Q. And when in relation to the service of the search warrant were those two visits?

A. They were prior to.

Q. Can you give me your best estimate as to the time frame?

A. Well, I think we discussed the domestic violence incident. It was about four months. The other one I do not recall specifically.

Q. Do you recall what kind of an incident that was?

A. It was a stabbing.

Q. All right. We'll refer to one as the domestic violence incident and the other as a stabbing incident so that we can distinguish the two.

On the domestic violence incident, what was your role?

A. I was just one of the backing officers.

Q. Do you recall whether you went inside the house that day or not?

A. I don't think we even went inside.

THE COURT: Excuse me one second, please. Sir, are you expected to be a witness in this case?

UNIDENTIFIED SPEAKER: No.

THE COURT: All right.

BY MR. NYE:

* * * *

[158] criminal activity, any newspaper clippings relating details of or referring to any crime or crimes of violence, any address books, lists of or single references to addresses, telephone numbers of persons who are determined to belong to or be affiliated with any street gangs.

Q. We know that this warrant was executed on February 3rd of 1998 and you've previously testified that you were involved in the decision to use SWAT for the entry team; is that correct?

A. Yes, I played a role in helping to determine that that was necessary.

Q. And just briefly can you tell us why you felt that you wanted SWAT to make the initial entry on this execution.

A. I believe we had a drive-by shooting that occurred so we had a member of a gang that was, had obviously demonstrated a propensity for violence, had used a firearm. We believed he still possessed a firearm and he lived potentially with another gang member in addition to the fact that on prior occasions we had responded to crimes of

violence at that house and specifically stabbings, domestic violence and other incidents. Those would raise our awareness to the point where we believe it's a high risk entry.

Q. Did you attend the briefing the morning before the service of the warrant?

A. The morning of the service? Yes.

Q. And were there other agencies involved other than the

* * * *

[168] returned.

Q. Now, we know that Iris Mena was detained throughout the period of the search; is that your understanding?

A. That's correct.

Q. And during that detention she was handcuffed, correct?

A. Yes.

Q. You were asked whether or not you released her and you told us no. Is there a reason why you didn't release her prior to the conclusion of the search?

A. Yes.

Q. Why is that?

A. A couple of reasons actually. The number one reason, although she appeared to be compliant, in my experience many times when people are in handcuffs they are compliant. However, we didn't know what her full motivation was or her involvement at the scene. Although I did not have any indication to believe that she was a gang member herself, I didn't know what kind of a supportive role she may play to the gang or whether or not she was involved in any way of associating with the gang members.

My feeling was that if I had unhandcuffed her at that point, the possibility would have arisen that she would have at some point inferred with our process. As an example, had she been friends with Mr. Romero and saw us recover something that could be somewhat damaging to him in the way of evidence,

she may try to run or interfere or get in the way of our search. [169] What that would necessitate is for us to now forcefully restrain her, placing her back on the bed or another position or possibly back in handcuffs.

That process might injure her. So my concern, especially as a supervisor now, although I wasn't a sergeant back then, the question I ask people that I supervise now is is there anything we could have done to prevent that potential damage from occurring or I should say the injury from occurring. And the hypothetical that I gave, had we injured her because we released her from handcuffs and had to restrain—

MR. MULLER: I'm going to object as non-responsive; narrative.

THE COURT: Overruled.

THE WITNESS: Had we injured her during that process and we could look back and say could we have avoided that injury by keeping her handcuffed in the first place, then yes, that's the best course of action. It prevents other problems from occurring.

BY MR. NYE:

Q. Is the handcuffing done in part for officer safety?

A. Absolutely.

Q. Is it done in part for the safety of the person handcuffed?

A. Yes.

Q. Did you ever consider releasing Iris Mena, sir?

[170] A. No.

Q. Now, you were required to document property that was seized; is that correct?

A. That's correct.

Q. And I believe that will be Exhibit 13 or perhaps 14. Let me check. Exhibit 13.

A. Yes.

Q. Do you recognize Exhibit 13?

A. Yes.

Q. And is that a true and accurate copy of your list of property seized during this particular search?

A. Yes, it is.

Q. Can you describe for us just briefly the property that was seized at 1363 Patricia Avenue.

A. Yes. We recovered notebooks containing miscellaneous gang writings, newspaper articles regarding the drive-by shooting that we were investigating, wallets containing I.D. or a wallet containing the I.D. of Ray Romero, .25 caliber bullets contained in a box that were recovered from Ray Romero's house—I'm sorry, from his room. A gang style T-shirt from his bedroom. A baseball bat that contains gang writing on the bat itself. A video depicting a gang lifestyle on the movie "American Me." A telephone containing gang writing scratched into it. A blow gun was in Ray Romero's room.

In the converted—that's not the diagram there—but [171] in the converted bedroom in the north part of the house, in the porch room there was a .22 caliber semi-automatic handgun that was recovered from there as well as .22 caliber rounds. Additional baseball bat containing gang writing and I believe it was recovered from the living room area or the common area. Fireworks, a ziplock baggie containing marijuana. And then the last two items are the 35 millimeter film for the photos that we see today as well as the video tape of the interior of the house.

Q. And those items were all recovered from the Patricia Street address; is that correct?

A. That's correct.

Q. Were you present when your partner Officer Muehler talked to Iris Mena at the conclusion?

A. I don't think I was.

Q. And your best estimate of the total time that Iris Mena was detained is what?

A. Anywhere from an hour and 45 minutes to two hours, somewhere in that time frame.

Q. Is that an unusually long period of time for a search of a residence such as this?

MR. MULLER: Objection; lacks foundation.

THE COURT: Sustained.

BY MR. NYE:

Q. Officer, have you been involved in the search of other

* * * *

[173] contained possibly in the boxes of clothing was very difficult.

Q. Did you see anybody do anything at all that you considered to be inappropriate care or treatment of Iris Mena?

A. No.

MR. NYE: That's all I have, Your Honor.

THE COURT: Thank you.

REDIRECT EXAMINATION

BY MR. MULLER:

Q. Sergeant Brill, I'm sorry about calling you Officer Brill.

Sergeant Brill, if I understand your testimony, you kept Iris Mena handcuffed for her own safety?

A. Well, yes.

Q. And you were also concerned about the safety of the officers?

A. That's correct.

Q. Iris Mena is a very small woman, 18-year-old old woman at the time. There were how many officers in the room there guarding her?

A. Two that I'm aware of most of the time.

Q. And did you really have a legitimate concern that Iris Mena was completely unarmed and completely cooperative was going to do something to the officers that was violent?

A. My concern was to prevent something from happening.

Q. Well, wasn't it really out of the realm of reasonable [174] possibility that Iris Mena was going to attack an officer?

A. It would seem unreasonable but people do unreasonable things. I'm not saying that she would do that. My concern is to prevent that from occurring. So you take steps so it never has the opportunity to occur.

Q. Well, isn't it your duty—

A. It's nothing personal.

Q. Isn't it your duty to assess the situation and act in a reasonable manner based on the facts that you see in front of you?

A. That's correct.

Q. And the facts that saw you in front of you were that this was a completely cooperative young, five-foot-two-inch woman who presented absolutely no hostility at all towards the police.

A. Was that a question?

Q. Weren't those the facts in front of you?

A. The facts were that—yes, those were the facts. However, my experience as a police officer also plays into my decision making. We don't work in a vacuum.

MR. MULLER: I would move to strike as non-responsive.

THE COURT: The second part of the answer is non-responsive. He responded to the first part fairly. So the second part about the reference to his experience as a police officer will be stricken. You can be questioned about that at the appropriate time if you want.

[175] THE WITNESS: Thank you.

BY MR. MULLER:

Q. And isn't it true that it's completely unnecessary to keep a cooperative person handcuffed during a search warrant service?

A. That's not true.

Q. Now, Lieutenant Thomas is the SWAT commander; is that correct?

A. Yes.

Q. He's very experienced in the service of search warrants?

A. He's experienced, yes.

Q. He was the supervisor on the scene?

A. Yes, he was.

Q. And so you would defer to his opinion about when it's necessary to handcuff someone or not, would you not?

A. Depending on the circumstances, yes.

Q. Well, would you defer to his opinion or not?

A. I can't say yes or no to that. It depends.

Q. So you may not, you might not defer to the opinion of Lieutenant Thomas who is the head of SWAT, who has many more years on the force than you do in certain circumstances?

MR. NYE: I'm going to object. That's an incomplete hypothetical.

THE COURT: Overruled.

THE WITNESS: What was the question then?

[176] BY MR. MULLER:

Q. Is what you're saying is that you would not, under certain circumstances you would not defer to Lieutenant Thomas in terms of whether it's necessary to keep a cooperative person handcuffed during a search warrant service?

A. I use my discretion. If I had a question about what I was doing, yes, I could ask for his opinion and to defer it for his judgment. But I believed what I was doing was correct. And had he believed what I was doing was incorrect, he could have corrected me and corrected the situation.

Q. Let me try the question again, just a short version of the question. You would defer—would you defer to Lieu-

tenant Thomas or not regarding the handcuffing or keeping a cooperative person handcuffed during a search?

A. Not necessarily, no.

Q. Okay. You said that the house was very messy and you made a comment how your house wouldn't be kept that way, right?

A. Correct.

Q. Did you feel better than the people who lived in that house?

A. Absolutely not.

MR. NYE: Objection; argumentative.

THE COURT: I just didn't get that. Repeat the question.

MR. MULLER: It was two questions. You just want the [177] last one?

THE COURT: Whatever the questions were to which there was an objection. I have to rule fairly and I didn't hear it.

MR. MULLER: Okay.

BY MR. MULLER:

Q. You testified that you felt the house was messy and you would never keep your house that way, correct?

A. Correct.

Q. Did you feel better than the people who lived in that house because of the way that house was kept?

MR. NYE: Which I objected to on the grounds it's argumentative.

THE COURT: Overruled.

THE WITNESS: Absolutely not.

BY MR. MULLER:

Q. Now, you said Romero could have hidden the gun anywhere.

A. Correct.

Q. And when you say anywhere, he could hidden it across the street, he could have hidden it in another house; is that right?

A. That's very true.

Q. But just because he could have hidden it in those places, without any evidence that the gun might be there, you would not search those places, would you?

A. Which places are you referring to?

Q. Across the street, in a house next door.

* * * *

[183] RECROSS-EXAMINATION

BY MR. NYE:

Q. You suggested you would like to justify your answer. Do so.

MR. MULLER: Objection.

THE WITNESS: If we're assuming a couple of things, when it was taken, assuming it's at the end of the search warrant, nothing that the items that were in the room to begin with, the number of items that needed to be searched through and the fact that our practice and in my experience as a police officer is that you don't return things to their original position, as ugly as it may look and I understand it's not easy, search warrants are inherently intrusive, yes, that would be consistent with what we'd have to do.

THE COURT: Is that it?

MR. NYE: Yes, Your Honor.

THE COURT: Okay. You're not going to ask more questions about that, are you?

MR. MULLER: No.

THE COURT: I have some questions, Sergeant.

THE WITNESS: Yes, Your Honor.

THE COURT: That concern the detention of Ms. Mena. You told counsel that there were two reasons why you didn't release her until the search was concluded. The first reason you said was that somebody who is totally cooperative, totally [184] compliant, when handcuffed may not be when the handcuffs are removed. That was the focus; is that correct?

THE WITNESS: That's correct.

THE COURT: And that would be you true for every single human being who was ever handcuffed, right?

THE WITNESS: Possibly, yes.

THE COURT: Okay. And the second reason you said was that if she had been released, maybe she would have done something that would have interfered with the search, correct?

THE WITNESS: Correct.

THE COURT: And that would be true of every single human being who could ever be handcuffed, right?

THE WITNESS: That's correct.

THE COURT: So tell us what circumstances, despite the fact that there could always be a risk that someone would no longer remain cooperative, that there would always be a risk that someone would interfere with the remaining work of the officers, under what circumstances if any would you ever conclude it was reasonable to remove the handcuffs?

THE WITNESS: I would limit it to a very few circumstances, number one being a pregnant woman or a person with a severe medical condition where it would actually endanger them for the purpose of being handcuffed, or that they were so elderly that the very nature of their existence would not pose any kind of threat to us at all. Off the top of my head, those [185] would be two examples of

certainly reasons why I would not handcuff somebody for that duration.

THE COURT: Did you ask Ms. Mena whether she was pregnant?

THE WITNESS: I did not ask her that, no.

THE COURT: Did you hear anyone else ask her whether she was pregnant?

THE WITNESS; I don't recall if that was asked.

THE COURT: Did you ask Ms. Mena whether she had any severe physical illness or medical injury?

THE WITNESS: I don't recall if that was asked of her and she—

THE COURT: Did you ask her?

THE WITNESS: No, I did not.

THE COURT: Did you hear anyone else ask her?

THE WITNESS: No.

THE COURT: Okay. And so the only third reason is severe age, right?

THE WITNESS: That would be another reason off the top of my head.

THE COURT: Okay. And if none of those reasons was present or you didn't bother to find out whether any of those reasons were present, it would be your practice no matter what the other circumstances to always keep the individual handcuffed throughout the entire duration of the search no matter how [186] cooperative or how compliant or how safe the circumstances were; is that correct?

THE WITNESS: In most cases, yes.

THE COURT: I have no further questions. Do you want to ask any questions in light of that?

MR. MULLER: No, Your Honor.

THE COURT: Do you?

MR. NYE: Just one question.

THE COURT: Go ahead.

FURTHER RECROSS-EXAMINATION

BY MR. NYE:

Q. How many people were handcuffed in the garage?
A. I believe four.

MR. NYE: Thank you.

THE COURT: All right. Thank you, Sergeant. You're excused.

Call your next witness, please.

MR. MULLER: Thank you, Your Honor. We call Arnold Baynard.

ARNOLD BAYNARD, SWORN

THE CLERK: Would you please state your full name and spell your last for the record.

THE WITNESS: Arnold Percy Baynard, B-a-y-n-a-r-d.

THE COURT: Please proceed.

DIRECT EXAMINATION

[187] BY MR. MULLER:

Q. Is it still Officer Baynard or is it Sergeant Baynard?
A. It's Officer Baynard.
Q. Okay. Because I want to make sure.
What is your current assignment with the Simi Valley police department?
A. I'm a senior officer of the police department. I'm a training officer and on the SWAT team.
Q. And when did you start with the SWAT team?

A. I believe it was August of '96.
Q. I want to bring you to a search warrant that was served February 3rd, 1998. Were you part of any meetings in preparation for the search warrant service?
A. Yes.
Q. And were you told anything about the place you were going to be serving the search warrant?
A. Yes.
Q. What were you told?
A. That we were going to look for a weapon. I believe it was a handgun that was involved in some type of crime.
Q. Were you told about any of the people that you might encounter?
A. Yes.
Q. What were you told?
A. That they, I believe they were gang members, possibly [188] gang members: And one of the officers talked about a domestic violence situation he had. I don't know if it was that year but it was prior to the search and he had spoke about the incident and said they would probably not be happy to see the police.
Q. Okay. And what was your duty on the date of the search?
A. I was going to be the person who did the forced entry.
Q. You were the ram guy?
A. Yes.
Q. And what are the duties of the ram guy or what were the duties of the ram guy on that date?
A. My first assignment was to get in line which I was, whatever the assignment. I think I was the fifth guy or sixth guy and I was to wait for Detective Lamb to do the knock and notice. And I believe it was Detective Lappin would tell me when to ram the door.
Q. Okay. And in terms of just the guy holding the ram, being the ram guy, what were the duties of the ram guy for that search warrant service?

A. To forcibly enter the residence.

Q. Now, were you told that you were going to make forced entries through multiple doors?

A. I don't recall.

Q. Do you recall your deposition of June 2nd, 1999?

A. Okay. Yes, I remember talking to you.

Q. All right. And is that deposition—

* * * *

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE A. HOWARD MATZ,
JUDGE PRESIDING

CASE NO. CV 98-8512-AHM

IRIS MENA, *et al.*,
Plaintiffs,

-v-

CITY OF SIMI VALLEY, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
THURSDAY, JUNE 14, 2001

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

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* * * *

[6] How did you enter the room?

A. Walked through the doorway.

Q. You didn't break the door open?

A. No, sir.

Q. Did you see any damage to that, the door jamb after you entered the room?

A. I didn't notice any, no.

Q. So you have no memory of knocking that door in.

A. No, sir.

Q. Do you remember Officer Lappin knocking that door in?

A. No, sir.

Q. Is that something you would remember?

A. If it was significant, yes.

Q. Well, I mean, would that be significant to you so that you'd remember it?

A. That specific incident wasn't significant enough for me to remember it, no.

Q. Okay. Once you got in the room, do you recall seeing a woman on the bed?

A. Yes.

Q. And did she appear to be sleeping?

A. Yes.

Q. And what did you do after you noticed this woman who appeared to be sleeping in the bed?

A. We told her not to move, identified ourselves as police [7] officers and continued to do that.

Q. And she did that?

A. Correct.

Q. What happened after you notified her that you were police officers?

A. I approached her, put her hands in a control hold and placed handcuffs on her.

Q. Explain what a control hold is.

A. Basically put her hands together behind her back like this (indicating) in order for me to, so I can use one hand in order to control both of her hands.

Q. Was she face down on the bed when you did this?

A. Yes.

Q. Now, when you notified her that you were police officers, do you know if she was fully awake yet?

A. I noticed at one point that she had opened her eyes. Whether she was fully awake, I don't know.

Q. Did you ever see anyone grab her and turn her around?

A. No.

Q. You didn't see someone grab her and turn her around right before the handcuffs were applied to her?

A. No, sir.

Q. Was she ever uncooperative while you were in contact with her?

A. No. She was very cooperative.

[8] Q. Did she do anything aggressive the entire time you had contact with her?

A. Not at all.

Q. After you handcuffed her, did you then stay in the room with her for a period of time?

A. Yes, sir.

Q. How long did you stay in the room with her?

A. I would estimate five to ten minutes.

Q. And at any time while you were with her, did she do anything to indicate she was a risk to you or to anyone else?

A. No, sir.

MR. MULLER: I have no further questions.

THE COURT: All right. Cross-examination or in your case direct examination.

MR. NYE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. NYE:

Q. Good morning, Officer.

A. Good morning.

Q. You've been with the police department for 11 years, did you say?

A. Yes.

Q. And what has been your experience with the police department in terms of assignments?

A. I originally worked patrol. Worked as a field training

* * * *

[15] A. No, sir.

Q. Did you see anybody do anything at all that you considered to be inappropriate?

A. No.

MR. NYE: Thank you.

THE COURT: Mr. Muller?

MR. MULLER: No questions.

THE COURT: Okay. Thank you, sir. You're excused.

Please call your next witness.

MR. MULLER: I would like to call Iris Mena to the stand.

THE COURT: All right.

IRIS MENA, SWORN

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Iris Mena, M-e-n-a.

MR. MULLER: Ms. Mena's deposition is on top of your desk there right in front of you.

DIRECT EXAMINATION

BY MR. MULLER:

Q. Good morning, Ms. Mena.

A. Good morning.

Q. How are you?

A. Good.

Q. Have you ever testified in court before?

[16] A. Never.

Q. And how old are you?

A. 22.

Q. Now, back on February 3rd, 1998, how old were you?

A. 18.

Q. And back on February 3rd, 1998, where were you employed?

A. I'm sorry? I didn't hear you.

Q. Oh, I'm sorry. Where were you employed?

A. PSI Bearings.

Q. What did you do at PSI Bearings?

A. I was checking parts for airplanes.
Q. Were you born here, Ms. Mena?
A. No.
Q. When did you come to this country?
A. Almost eight years ago.
Q. And where did you come from?
A. El Salvador.
Q. When you came to this country, did you have proper immigration papers?
A. Yes.
Q. And what is your immigration status now?
A. Resident alien.
Q. Are you applying for your citizenship?
A. Yes.
Q. And what stage of the process are you at?
[17] A. I have given my fingerprints twice. And I'm just waiting for them to make an appointment so I can go and proceed to whatever they do to be able to be a citizen.
Q. Now, how old were you when you came here?
A. 14.
Q. And before you came here, did you speak English at all?
A. No.
Q. And what are you currently doing?
A. I have a seven-month beautiful baby boy. I take care of him. Sorry. I'm just kind of nervous. I'm trying to get my high school diploma to be able to be a surgical technician and offer him a better life.

THE COURT: One second, Mr. Muller. If you'd like to pour some water and if at any point if you need to take a break, just let me know. All right?

THE WITNESS: Thank you.

BY MR. MULLER:

Q. Did you say that you're studying to be a surgical technician or you want to study to be a surgical technician?
A. I want to be a surgical technician.
Q. You'll let me know if you don't understand any of my questions, okay?
A. Okay.
Q. Feel free to do that.
A. Okay.
[18] Q. Now, on February 2nd, did you work the day before the incident?
A. Yes, I did.
Q. And what was your shift?
A. It was from 3:00 in the afternoon until 12:00 o'clock, midnight.
Q. And what time would you usually get to bed when you worked that 3:00 p.m. to 12:00 midnight shift?
A. Usually like around 2:00 o'clock in the morning.
Q. And you lived at 1363 Patricia Avenue back on February 3rd, 1998?
A. Yes.
Q. Who did you live with?
A. With my parents, my mom.
Q. And who is your mom?
A. Maria and my dad Jose.
Q. Where was your mother the morning of February 3rd, 1998?
A. She was at work.
Q. Can I ask you to move that Kleenex just a little bit. It's kind of blocking my view of you. Thanks.

And what time, do you know what time she left for work that morning?

A. She usually like around 5:00 o'clock in the morning.
Q. And where was your dad?
A. In Long Beach where he works still.

[19] Q. And why was he in Long Beach that morning?

A. Because he's a truck driver and he works for that area.

Q. Did he sleep at home on February 2nd, do you know?

A. No, he didn't.

Q. Do you know where he slept?

A. I believe that his trailer has a bed inside there so he used to sleep there.

Q. The truck trailer has a—

A. The truck trailer, yes.

Q. —has a compartment over the cab where you can sleep?

A. Yes.

Q. I want to take you to February 3rd, 1998. Were you woken up by something unusual?

A. Yes, I was.

Q. And how were you woken up on that date?

A. All I heard, it was a big bam on my door, my bedroom door. I'm not sure if it was the bedroom door or the front door. And I saw a person dressed in black pointing a gun with a light on top.

Q. What do you mean by a light on top, the gun had a light on top?

A. It looked like it was a long gun pointed at me like this (indicating) and with a light on top.

Q. So like a flashlight pointing at you?

A. Yes.

[20] Q. Did they point that at your face or your body?

A. At my face.

Q. And did you hear—strike that.

Was that just one person or were there two?

A. It was only one.

Q. Do you ever remember another person with a gun in your room that morning?

A. No, I don't remember.

Q. And do you remember the person saying anything when they pointed this gun at your face?

A. Yes. They told me to stand up and turn over and put my hands back.

Q. Now, you said "they" told me to stand up. You know they means two people.

A. No. I just heard only one voice. It was only him.

Q. They told you to stand up and to do what?

A. To turn over and put my hands behind my back.

Q. All right. Now, when these people or this person came in, did you know who they were—who he was?

A. No, I didn't.

Q. What did you think when you saw this person come into your room with the long gun and pointed it at you?

A. I thought he was just coming in to rob and kill me.

Q. And what happened after you turned around?

A. I stood up like I was said and I was facing down, looking [21] at the bed, and he pushed me on the bed and he grabbed my hands and put the handcuffs on me.

Q. How did you feel when you were pushed—emotionally how did you feel when you were pushed down on the bed?

A. I was real afraid.

Q. Why were you afraid?

A. Because I didn't know who they were and why they were doing that.

Q. Now you're saying they again. Do you mean—

A. Him.

Q. Okay.

A. Yeah, because I could hear voices. That's why I say always they. Like people talking outside.

Q. You heard people talking outside your room, voices you didn't recognize?

A. Yes, I didn't recognize.

Q. Now, at any point in time before you were handcuffed, did you hear anybody say police or anything like that?

A. No.

Q. Did you see anything on this person to indicate that he was a police officer?

A. No.

Q. Was it light or dark in your room when this person came in?

A. Real dark.

[22] Q. Why was it real dark?

A. Because the lights were off and it was early in the morning and the windows were closed. And my mom has a real thick curtain on the window that makes it darker inside the room too.

Q. Now, at the point that you were handcuffed, did you then think that this might be police who were in your room?

A. Yes.

Q. And why did you think that?

A. Because I think those are the only persons that put handcuffs on people.

Q. What happened after you were handcuffed?

A. I was facing down on the bed and he pulled my shirt and he stood me up to take me out of my house to the garage.

Q. Now, just for the written record, you made a motion to the back of your neck. Is what where he pulled your shirt?

A. Yes.

Q. And then he made a motion for you to go where?

A. To the garage.

Q. Describe what you mean by he made a motion.

A. He just grabbed me by my shirt and he was holding my arm and took me into the living room to the kitchen to go to the garage.

Q. Now, what were you wearing when you were asleep in your bed?

[23] A. Green sweats and a black long-sleeve shirt.

Q. Okay. Were you—before you were taken out to the garage, were you allowed to put on any shoes?

A. No, not that I remember.

Q. And to get to the garage, do you have to go outside?

A. Uh-huh, yes.

Q. And was it raining that day?

A. It was raining.

Q. How hard was it raining?

A. Medium raining.

Q. So did you have to walk through wet ground to get to the garage?

A. I'm sorry?

Q. Was the ground wet when you walked outside to get to the garage?

A. Yes, it was.

Q. And just we're probably all clear on this but is this the route you took through the living room, through the kitchen, out this door and all the way across here to the garage?

A. Yes.

MR. MULLER: And I'm referring for the record to Exhibit 61A.

BY MR. MULLER:

Q. you said you were awakened by a bang. Was it one bang or more than one bang?

[24] A. I heard only one.

Q. Now, was your bedroom door locked when you went to sleep that night?

A. Yes.

Q. Why was it locked?

A. We usually lock our bedrooms for the people that was renting over there like the other people.

Q. Okay. Can you explain that a !ittle because, I mean, can you explain the reason why you locked the bedroom for the people.

A. Because I didn't trust the person that was living with us.

Q. And who is that?

A. I think his name was Raymond.

Q. Raymond Romero?
A. Yes.
Q. And why didn't you trust him?
A. Because I didn't know what kind of person he was. We never have a big relationship with the persons that rents the room in our house.
Q. How long had Raymond been living at your house before the search?
A. I don't know. He was living there since I moved back to my parents'. November '97, I believe.
Q. Okay. Did your door have a padlock?

[25] THE COURT: Do you know what a padlock is?

THE WITNESS: Yes. Yes.

THE COURT: Okay. Go ahead.

BY MR. MULLER:

Q. Okay. And was the padlock on when you went to bed?
A. Not the one on the outside. But the one on the inside was.
Q. And you're smiling because obviously you couldn't lock the padlock from the outside and then get in the room.
A. No.
Q. And in general, did you lock your room every time you left home?
A. Yes.
Q. And why did you lock it every time you would leave home?
A. Because I had personal things in my room and I didn't want the people that share the house to get into them.
Q. When you took a shower, would you lock the room?
A. Yes, I would.
Q. And is that for the same reason?
A. Yes.
Q. What happened when you were taken out to the garage?

A. We were told to stay in the garage. We sat on the bed that was right there. I was asking one of the officers that was with us what was going on. And he said that he wasn't in charge to explain it to me what was going on.
[26] Q. Now, before you got to the garage, did any officer tell you what was going on?
A. No.
Q. Did any officer show you a search warrant?
A. They never did.
Q. So for the entire time the officers were there, they never showed you a search warrant?
A. No.
Q. When you were in the garage, did you have any other conversation with the police or with any police officer after you asked what was going on?
A. I asked them why I had to be handcuffed. And he said that that was part of doing their job.
Q. And was that all he said about you being handcuffed?
A. I asked him why they don't take it off. And he said that he had asked one, his, they're like their highest officer, if he would be able to take it off, the handcuffs.
Q. How did you feel about being handcuffed?
A. I felt real humiliated.
Q. And before that day, had you ever been handcuffed?
A. I never had.
Q. Had you ever been arrested?
A. Never.
Q. Had you ever had any problems with the police?
A. Never.
[27] Q. And what was the feeling like of being handcuffed, was it painful?
A. It was real uncomfortable.
Q. Did it get more uncomfortable the longer you were handcuffed?
A. Yes.

Q. Did you have any other conversations with people, with police officers while you were in the garage?

A. One of them asked me what was my name and my date of birth and where I was from and if I was a legal alien in this country.

Q. Do you know who asked you that?

A. I think it was the officer that was with us the whole time in the garage.

Q. Okay. Now, you're saying "us." Who else was in the garage with you besides the officers?

A. Three people. It was Leticia, Shawn and Carlos.

Q. All right. After you were asked about whether you were a legal, whether you were illegal or not, did you have any other conversation with the police?

A. No.

Q. At some point in time did someone get you shoes and a jacket?

A. After a while, they did.

Q. Now, when you—were you ever asked to prove that you [28] were a legal resident or a citizen of the United States?

A. Yes.

Q. And explain to the jury what happened there.

A. I believe they called another person and he was, he got into the garage after a while and he said that he was from the immigration and he asked me where my papers were. And I said they were in my purse inside my room. He said where they were at. I told him and they went and got inside the house. One of them got inside the house. And once they got my purse and he took out the papers out of my purse and give them to the person from the immigration center.

Q. The person who got your purse, was that a police officer or was that a person from immigration?

A. A police officer.

Q. Did you give them permission to go into your purse?

A. I told him where they were but I never told them open my purse. He was like telling me where my papers were.

Q. While you were sitting in the garage, did you hear anything going on in your house?

A. Yes.

Q. What did you hear?

A. I was hearing like there were people moving stuff, throwing stuff and breaking noises too.

Q. Did you ever see an officer break a door?

A. Yes, I did.

[29] Q. And how did you see the officer break the door because you were in the garage, how were you able to see that?

A. The door was all the time kept opened.

Q. We're referring to Exhibit 61. Can you tell me where that door was in Exhibit 61.

MR. NYE: Excuse me, Your Honor. May I move around so I can see what he's point to.

THE COURT: Yes. You can move over there.

THE WITNESS: Where it says "convert bedroom."

BY MR. MULLER:

Q. Yes.
A. Right there where you're pointing.
Q. This one over here?
A. No. That one.
Q. This door.
A. Yes.
Q. Where were you when you saw that?
A. I was sitting on the bed.
Q. Where, in the converted garage?
A. Uh-huh.
Q. Where was that—
A. Yes.

THE COURT: Wait, wait one second. Does "um-hum" mean yes?

THE WITNESS: Yes.

[30] BY MR. MULLER:

Q. Where in the converted garage were you sitting?
A. On the bed.
Q. Where was that bed?
A. It was right in front where the door was opened.
Q. Right here (indicating)?
A. Yes, right there.
Q. Were you ever moved from that bed?
A. I moved myself because it was kind of cold and I wanted to get a little bit more inside the garage.
Q. So where did you move to?
A To the next bed that it was right next to.
Q. Okay.

THE COURT: Why don't you write in "Bed 1" closest to the door at a point where the witness can tell you where it would be appropriate. Use a red marker or something. It doesn't really matter but write it down.

BY MR. MULLER:

Q. Is this where it was (indicating)?
A. Yes.
Q. And the door that you saw being broken apart was right here (indicating)?
A. Yes. It was already broken. It was just a piece.
Q. So the door was already broken when the officer broke it?
A. Yes.

[31] THE COURT: You mean the door was already broken when she first saw it.

MR. MULLER: I'm sorry. Let me clear that up.

BY MR. MULLER:

Q. When you first saw it, was the door already partially broken?
A. Yes, it was.
Q. And what did the officer do to it?
A. There was a piece of the door laying on the floor and he grabbed it, he threw it back on the floor and he said I like to break this kind of material. It feels like cardboard.
Q. Okay. And do you recall the name of that officer?
A. No.

MR. MULLER: I would like to approach the witness.

THE COURT: You may.

BY MR. MULLER:

Q. I'm showing you Exhibit 54.

MR. MULLER: I think I need her to approach so the jury can see her.

THE COURT: All right. You may step down, Ms. Mena, and approach the chart the lawyer just put on the easel. Stand nearby it, please.

(WITNESS COMPLIES)

BY MR. MULLER:

Q. All right. I would like you to take a look at this [32] chart with the photographs. Can you identify the officer that you saw breaking the door?
A. I don't remember.
Q. Do you recall at your deposition you were shown photographs of the officers?
A. Yes.
Q. And do you remember at your deposition that you were able to identify the officer who you saw breaking the door apart?
A. Yes, I remember.

Q. I'm going to show you, to refresh your recollection, I would like to show you Exhibit C from your deposition. Does that refresh your recollection as to the officer, the name of the officer who you saw breaking the door?

A. No. I can't remember his face right now.

Q. Okay.

MR. MULLER: And for the record, I showed the witness a picture of Officer Vince Allegra.

THE COURT: Okay. And the exhibit number for the collection of the photographs is what?

MR. MULLER: That's Exhibit 54.

BY MR. MULLER:

Q. At some time did you see someone video taping?

A. Yes, I did.

Q. Who did you see video taping?

A. It was a lady.

[33] Q. How did you feel when you saw this person video taping you?

A. Embarrassed.

Q. Why were you embarrassed?

A. Because I thought that he was going to show the TV and say that we were criminals.

Q. Did you say anything when you saw this person video taping?

A. Yes. I asked them why they were video taping.

Q. And what were you told?

A. They told me it was part of their job to do that.

Q. Were they friendly to you when they said that?

A. No.

Q. How did they say it to you?

A. They just, he just yelled at me and said that.

Q. And who do you mean by "he"?

A. The person who was with us in the garage all the time.

Q. And that person, when you say "person," you mean officer?

A. Officer.

Q. Did the immigration service, did they come before or after that video tape was taken of you?

A. I don't remember.

Q. Now, your father rented rooms in your house. Who was renting rooms inside the house on the date of this search; do you remember?

[34] A. Only Raymond.

Q. What about the converted, I think we're calling it converted bedroom, was somebody renting that?

A. Yes.

Q. Did you consider that part of the house?

A. Yes.

Q. Now, were the rooms, were each of the bedrooms that were rented out, were they private?

A. Yes, they were.

Q. How, were the rooms kept private?

A. They had their own key.

Q. What do you mean they had their own key?

A. They had their locks.

Q. Each person had a key to his or her room?

A. Yes.

Q. And what about the trailers and motor homes in the back yard, were they private?

A. Yes, they were.

Q. Was anyone besides you, your father and your mother allowed access to your bedroom?

A. No, nobody.

Q. Where did your father keep his clothes on February 3rd, 1998?

A. In the outside drawers that they were in the living room.

MR. MULLER: Okay. At this time I would like to show [35] Exhibit 51, the video tape, and I'd like to go through it with Ms. Mena. I'll try to speed through certain parts.

(VIDEO TAPE PLAYED)

BY MR. MULLER:

Q. All right. Let's stop it right there. Now, I see something up here on the wall in the video tape. First of all, what room is this?

A. That's the living room.

Q. And I see something up on the wall here. What are those?

A. They're signs for the people that lives in the house.

Q. And what do those signs say?

A. One of them I believe says that they have to clean the stove every time they cook and also wash their own dishes.

Q. Can you remember any of the other signs?

A. One of the signs I think says that they're not allowed to turn it on the TV in the living room.

Q. So were the renters allowed to use the living room and kitchen and bathroom inside the house?

A. Yes, they were.

Q. But not the TV always.

A. No. They were allowed to cook in there and sit down on the table in the living room. And if they feel like it, they could sit down on the couches.

Q. All right. Now what are we looking at?

A. That's the front door.

[36] Q. And are those the signs you were talking about?

A. Yes.

Q. Here we're looking at the kitchen?

A. Uh-huh, yes.

Q. Now we're looking at the converted bedroom here (indicating) ?

A. Yes.

Q. Do you see the part of the door that you saw the officer break and say that he enjoyed breaking it because it was like cardboard?

A. It was a piece laying outside the room.

Q. Now, who inhabited this room?

A. Marcos.

Q. Do you know Marcos' last name?

A. Cordon.

Q. And do you see a refrigerator in the room?

A. Yes.

Q. Did all of the renters' bedrooms have refrigerators?

A. Yes, they did.

Q. Do you recall if this room had a padlock on it?

A. It did.

Q. Now, do you see—I'm getting confused. Now we're outside.

All right. Now where are we looking?

A. My room.

[37] Q. And you see the photographs on the wall. What did we have on the table here?

A. Usually perfumes and lotions.

Q. Now, I notice a lot of boxes in the room full of clothes. What are those?

A. Those are clothes that we collect from my family and friends because we are volunteers for the organi—I can't say that word—to the rescue organization.

Q. Let me stop the video. The rescue what?

A. Organization.

Q. Organization?

A. Organization. And they collect clothes for the homeless people, this country and Central and South America.

Q. So were all the boxes for those people or were some of those just your possessions?

A. A lot of boxes it was to send to these people.

Q. And some of the boxes were your possessions too?

A. The ones inside the room only. Not the ones in the living room.

Q. Okay. So let me get this straight. The ones in the living room were the ones that you were sending to people.

A. Yes.

Q. Now, I notice a lot of clothes piled up there. Why are those clothes piled up in the closet of your bedroom?

A. Because they wouldn't fit in the drawers.

[38] Q. And who kept their clothes in this room?

A. My mom and I.

Q. I will stop right here. Do you see the door jamb right here (indicating)?

A. Yes.

Q. Was that broken like that before the search?

A. No, it wasn't.

Q. And now we're looking and referring to Exhibit 61A. Is this the empty bedroom?

A. Yes.

Q. Now, was this bedroom door locked on the date of the search?

A. No, it wasn't.

Q. And how do you know that?

A. Because it was empty.

Q. So this door could have been opened just by turning the handle?

A. Yes.

Q. This is Raymond's room (indicating)?

A. Yes.

Q. Had you ever been in Raymond's room before the search?

A. No.

Q. Now, what are we seeing here, what room are we seeing here (indicating)?

A. The garage.

[39] Q. Is this the converted garage?

A. Yes.

Q. Do you know if that door was open or closed?

A. It was open too.

Q. And why do you say that?

A. Because it was empty.

Q. What do you mean by "empty"? Isn't there furniture in there?

A. Yes. But nobody was living there.

Q. All right. And we see a bed. Is that bed depicted in Exhibit 61, the bed we just saw?

A. Yes.

Q. And was that the bed where you sat initially?

A. Yes.

Q. And this video was taken after they got you the jacket. Let me ask you then: Are you wearing the jacket that the police got you in this video?

A. Yes.

Q. How long had you been sitting in the garage before this video was taken?

A. I don't remember. It was probably like half an hour, an hour.

Q. Are you sure about that?

A. No, I'm not sure.

Q. Who is sitting next to you on the bed?

[40] A. Leticia.

Q. Do you know how old Leticia is?

A. She's 55 now.

Q. And where did she live?

A. She lived in one of those trailers.

Q. And who is pictured now in the video?

A. Shawn.

Q. Shawn who, do you know Shawn's last name?

A. No, I don't.

4. And where did Shawn live?

A. In the other, in the motor home.

Q. Do you see a man standing behind Shawn; do you recall who that was who was wearing those clothes?

A. I think it was Carlos.

Q. When the INS came, was anyone taken away by the INS—I'm sorry.

A. Who's the INS.

Q. You don't know. When immigration came, was anybody taken away by immigration?

A. Yes.

Q. Who was taken away?

A. Carlos.

Q. And can you identify the police officers who are in the room here with you?

A. No, not right now. I don't remember.

[41] Q. Now, what's this view that we're looking at here (indicating)?

A. Outside of the garage, the back yard.

Q. Okay. And we're looking into the converted garage?

A. Yes.

Q. And so if you were facing out from the converted garage, what would you be looking at?

A. Straight ahead to Marcos' room.

Q. That's the converted bedroom?

A. Yes.

Q. All right. Now, after that video was taken, how long were you sitting in the garage there; do you recall?

A. For a long time after that.

Q. Do you have an estimate?

A. Probably like two hours.

Q. I will play again Exhibit 51. Now, what does this show right here (indicating)?

A. That was a drawer where my dad used to keep his important papers—

Q. Was that—

A. —inside our room.

Q. Was that drawer locked?

A. It had a lock on it.

Q. Now, a lot of the rooms were padlocked. Were there any closets that were padlocked?

[42] A. All of them were.

Q. Did you have keys to the padlocks?

A. Yes, I did.

Q. Where were those keys?

A. In the second drawer right there. The one that is not broken.

Q. So the second drawer right here (indicating)?

A. Yes.

Q. Was that drawer locked?

A. No, it wasn't.

Q. Would you have given the police keys to the padlocks if they had asked you?

A. Of course.

Q. Why is that?

A. Because I just wanted to cooperate with them.

Q. Now as we go through, can you tell me, point out things that you see that were different in your room from when you had gone to bed that night.

A. That mountain of clothes on top of the bed and also some items on the floor.

Q. What were the items on the floor? We'll have to back up.

A. Yes, you'll have to back up a little bit. Right there (indicating).

Q. Those items weren't on the floor before?

A. No.

[43] Q. How long did it take you to put that mountain of clothes back? Let me back up. Who put that mountain of clothes back?

A. My mom and I.

Q. And how long did it take you and your mom to put those clothes back?

A. Probably like part of that day and the next day too.

Q. Okay. Do you know what part of that day it took?

A. After they left, I called my mom and she came and we started trying to clean it up a little bit.

Q. So can you—was it an hour, two hours, ten minutes?

A. No, all day.

Q. How did you feel about police officers going through your possessions, your things?

A. I just felt that it wasn't right.

Q. As we go through this, point out anything that you can recall that's different from before the search to after the search. Let me stop. Did you keep food in that refrigerator?

A. Yes.

Q. I notice something right here (indicating). Do you know what that is?

A. Gloves.

Q. Did you see plastic gloves throughout your house?

A. Everywhere.

Q. Where were they?

A. Some was on the floor. Some were on the kitchen table. [44] By the chimney too. On the kitchen floor too.

(END OF TAPE)

Q. And did you have to do any other cleaning up besides the clothes on the bed, other things inside your room?

A. The living room, the closets. I had to clean the floors too because they were muddy. They were really dirty.

Q. Was your house clean before they came in?

A. Yes, it was.

Q. Was there, were there boxes?

A. There were boxes. But I don't think it was dirty like a lot of people said in here.

Q. I will stop again. Is this another glove on the floor?

A. Yes.

Q. These boxes here, what are those?

A. Those are the boxes that we always kept in the living room for the rescue mission.

Q. And you see some more gloves right here (indicating)?

A. Yes.

Q. And are those also a pile of gloves on the table?

A. Uh-huh. There's more right there too (indicating).

Q. Did you have trash cans in your house?

A. Yes. Those appliances, they weren't outside before the search. They were inside. They were inside those doors.

Q. You're talking about the appliances on the stove?

A. Yes, none of those.

[45] Q. What about this door, was it broken before the search?

A. No, it wasn't.

Q. Now, going into this room, do you see the pieces of door that you testified that the officer was breaking?

A. It was just right there (indicating). You have got to back up a little bit.

Q. Let's see if the video backs up.

A. Okay.

Q. All right. Do you see the door?

A. Yes. It's that piece right there on the floor (indicating).

Q. This one (indicating)?

A. Yes.

Q. Was the officer laughing when he said he enjoyed breaking that kind of stuff?

A. Yes, he was.

Q. Did you see who he was talking to?

A. Huh-uh, no.

Q. Now, this converted bedroom, was it—let me ask you this. When did your father purchase the home on Patricia?

A. Two years after I came to this country. I was 16 years old so it was like six years ago.

Q. Was this converted bedroom in the house when you guys came to it?

A. Yes, it was already there.

[46] Q. Had anyone told you before the search that this was not a legal addition to the house?

A. Before the search?

Q. Before the search.

A. No.

Q. And that was the view from the converted bedroom to the garage that we just saw?

A. Yes.

Q. The empty bedroom again. Let me fast forward.

And what are we looking at here?

A. That's another closet.

Q. Who kept stuff in that closet?

A. My mom.

Q. And was that closet padlocked?

A. Yes, it was.

Q. And is this a different closet?

A. Yes.

Q. Was that closet broken from the search?

A. Yes, it was.

THE COURT: You still have it moving. Is it rewinding?

MR. MULLER: I thought I had pushed stop. I'm sorry.

BY MR. MULLER:

Q. While you were in the garage, did anyone ask you about Raymond Romero?

A. No, they never did.

[47] Q. Now, if you had heard someone knocking at your front door, would you have let them in that morning?

MR. NYE: Objection; calls for speculation.

THE COURT: Overruled.

THE WITNESS: Does that mean I can answer it?

THE COURT: You can answer, yes.

THE WITNESS: Okay. I would if I would have known who it was.

BY MR. MULLER:

Q. How far was your bed from that front door, do you know approximately?

A. Probably like a few steps.

Q. So based on your living in that room for several years, do you believe that you would be able to hear someone knocking loudly at that front door if you're in your bedroom?

A. Yes.

Q. Do you know if the sun was up when the police came to your house?

A. No, it wasn't.

Q. Now, was that because it was cloudy out or was that because it was not dawn yet?

A. It wasn't dawn yet. It was what you said. Sorry.

Q. I want to be clear because I don't want to confuse you. Do you know if the sun had risen or do you know if it was just the sun wasn't out just because there were clouds in the sky?

[48] A. It wasn't out because it was raining that day.

Q. Okay. Now, how has this search affected you emotionally?

A. It had affected me. I had nightmares after this happened thinking that they were going to come into my house again and do the same thing. And still at this moment sometimes I still have nightmares about it.

Q. What are those—do those nightmares follow kind of a same type of scene in your head; is it the same thing you see?

A. Yes, the first thing that I saw. And when they come into my room with their black uniforms pointing a gun at me.

Q. Would these nightmares wake you up or would you continue to sleep?

A. They wake me up.

Q. When did you finally learn why the police were there at your house?

A. Why they were in the house, you said?

Q. Yes. When did you learn why the police were in the house?

A. When they took me back into the living room.

Q. Were you still handcuffed when you were taken into the living room?

A. Yes.

Q. And when were your handcuffs removed?

A. When I was in the living room again, back again.

Q. And what did the police tell you at that time?

[49] A. I asked them why they were there and they said that they were looking for some gun in the house that was related to some type of case that they were trying to solve.

Q. Did they say anything else to you about it?

A. No. I told, I asked them how come they didn't ask me for the keys. And they said that that was the way that they were taught to work and they had the right to do it that way.

Q. What did you take that to mean, the way they were taught to work?

A. Like that was the way they had to work.

Q. You mean that they were taught to break into rather than ask someone for the keys?

A. Yes.

MR. NYE: Objection; leading.

THE COURT: Sustained.

BY MR. MULLER:

Q. Did you have any conversation with that officer about the damages to your house?

A. I asked them who was going to replace the doors. And he said that I needed to talk to the city, the City of Simi Valley, and they would replace all the damages around the house.

Q. And did the City of Simi Valley ever replace the damages around the house?

A. No.

MR. MULLER: I don't have any further questions.

[50] THE COURT: All right. Thank you.

Cross-examination.

MR. NYE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. NYE:

Q. Good morning, Ms. Mena.

A. Good morning.

Q. I don't think we've formally met before. My name is David Nye.

A. Pleased to meet you.

Q. Your date of birth is March 22nd, 1979; is that correct?

A. Yes.

Q. And you lived at 1363 Patricia Avenue right up until your 18th birthday; is that correct?

A. Yes.

Q. And then when you turned 18, you moved out of the house; is that correct?

A. Yes.

Q. You moved in with your boyfriend at the time who eventually became your husband; is that correct?

A. Yes.

Q. You left—you would have moved out of the house around March 22nd of 1997; is that right, your 18th birthday?

A. Yes.

Q. And then you moved back into the house in about October [51] of 1997, correct?

A. Yes.

Q. And that was because your marriage had not worked out, correct?

A. Yes.

Q. Then you lived in the house from October 1997 up until the date that the search warrant was served which was February 3rd of 1998; is that right?

A. Yes.

Q. And you were living in the house the whole time?

A. Yes, I was.

Q. After the search warrant was served, you continued to live in the house from February 3rd, 1998 up until July of 1998; is that right?

A. Yes.

Q. And then in July you actually continued to live there but you started spending nights away from the house; is that right?

A. Yes.

Q. And you met a new boyfriend in June of 1998 and you began spending the nights with him in July of 1998?

A. It wasn't with him. It was in the house where his aunt lives. But it wasn't with him.

Q. I just meant in the same building with him.

A. Yes.

Q. In other words, you were not spending the nights on [52] Patricia Avenue after July of 1998; is that correct?

A. Yes.

Q. Where do you currently live?

A. With my parents.

Q. When did you move back into the house?

A. Like around November of '98.

Q. Okay. Between the time that the search warrant was served on your house and the time that you started spending nights elsewhere, which would have been about four or five months later, did you ever go to see a doctor or a counselor of any kind about your nightmares?

A. No, I didn't.

Q. Do you seek out any kind of medical treatment for any problems that you associated with the search warrant execution?

A. I didn't.

Q. Now, have you always shared a room with your mother when you lived at Patricia Avenue?

A. Yes.

Q. Has it always been the same bedroom you pointed out on the diagram?

A. Yes.

Q. And is the reason that you share a room with your mother so that there will be additional rooms that are available to rent out to other people?

MR. MULLER: I'm going to object as irrelevant.

[53] THE COURT: Sustained.

BY MR. NYE:

Q. You indicated that your father worked in Long Beach and spent how many days a week at the house?

A. Usually five days.

Q. Five days a week at your house?

A. No. He used to spend five days a week at his work in Long Beach.

Q. That's what I thought.

Now, at the time that this search warrant was executed, you had—strike that.

Before the search warrant was executed, in the weeks or months before that you would have people sleeping in rooms in various places in that house; is that correct?

MR. MULLER: Objection; vague.

THE COURT: Did you understand the question, Ms. Mena?

THE WITNESS: No, I didn't.

THE COURT: Okay. Could you reframe the question.

MR. NYE: Certainly.

BY MR. MYE:

Q. Would your father on occasion rent out the garage for people to sleep in?

A. No.

Q. Did he ever rent out the garage for people to sleep in?

A. You mean before this search?

[54] Q. Yes.

A. I don't remember if he ever did.

Q. You don't remember one way or the other if people were ever tenants in the garage?

A. No.

Q. He would rent out the other bedrooms in the house though, would he not?

A. Yes.

Q. And that would include the bedroom that Ray Romero was staying in at the time of this search warrant?

A. Yes.

Q. And the other bedroom that was vacant at the time, would that be rented out at times?

A. Yes.

Q. How about the converted room off the porch there where Mr., where Marcos was residing, was that rented out on a pretty regular basis?

A. Yes.

Q. How long had Marcos lived there; do you know?

A. He lived for a long time in that house.

Q. And how long had Mr. Hynes, that's Shawn Hynes, how long had he lived in your back yard?

A. I don't remember.

Q. Do you have any estimate for me?

A. No.

[55] Q. Was it, can you tell me if it was weeks or months or years?

A. No, I can't tell you.

Q. How about Leticia, do you know how long she had lived in your back yard?

A. She lived there for a long time.

Q. And you had a camper back in your back yard too, did you not, back in the very back corner?

A. For a what I have told I know, yes.

Q. Do you know if the camper was rented out?

A. No.

Q. You don't know or it was not?

A. I don't know.

Q. You had a couple trailers in your back yard too?

A. Yes.

Q. Were those routinely rented out to tenants?

A. Yes.

Q. And these tenants that would live in the motor homes and the trailers and the bedrooms, they would have access in and out of the house, would they not?

A. They would.

Q. They could come in and use the kitchen; is that correct?

A. Yes.

Q. And the bathroom?

A. Yes.

[56] Q. And the living room?

A. Yes.

Q. And they would have their own key to get in and out of the house; is that correct?

A. Yes.

Q. And they would all have the same key though; is that right?

A. Yes.

Q. At any time while you were living at the house, did people have animals at the house?

A. Just us.

Q. And what kind of animals did you have?

A. Two dogs.
Q. Are these big dogs or little dogs?
A. One of them is big and the other one is medium.
Q. Were the dogs allowed inside as well as outside?
A. What do you mean by inside and outside?
Q. Were the dogs allowed inside the house?
A. Yes.
Q. Were your tenants allowed to bring friends over and visit?
A. Yes.
Q. And the friends could come in the house also?
A. Most of the times they would knock on the front door and we would call whatever they were looking for and these people [57] used to come out of the house and talk to them.
Q. Did your tenants ever use the living room or the dining room to entertain their friends?
A. No.
Q. Would the tenants change; would you see new faces quite often?
A. They usually used to rent the rooms for a long time.
Q. Do you remember a gentleman by the name of Janero Gonzales?
A. I never saw him living in there.
Q. Do you know if Janero Gonzales ever rented a room from you?
A. No, I never knew.
Q. But you did know that Mr. Ray Romero was renting a room from you?
A. Yes.
Q. Did you know that Ray Romero was a gang member?
A. No.
Q. Do you have the right to screen the people that will be tenants at your house? In other words, does your father come to you and say I'd like you to meet Mr. Romero, I'm going to rent a room to him, what do you think?
A. No.

Q. That doesn't happen?
A. No.
[58] Q. If you see a new face around the house, somebody that you hadn't seen before, do you ask that person if they're living there or do you just assume that they're a new tenant.

THE COURT: Well, are asking about what happens now?

MR. NYE: No. This is back in—

THE COURT: Okay. Well, then please frame your questions accordingly, Mr. Nye. You keep saying do you do this, do you do that.

BY MR. NYE:

Q. Back in February of 1998, if you saw a new face in the house, somebody that you had not seen before, would you ask that person if they were living there?
A. Well, before they would have started living in the house, my dad would tell me, look, this person is going to start living over here, he's going to start renting a room over here.
Q. Would he introduce you to the person?
A. Yes.
Q. Would you have any right to say I'm not comfortable with that person living there?
A. Of course.
Q. Did you do that with Mr. Romero?
A. He was already living there when I went back to my parents' house.
Q. What is the most people that you can remember before February of 1998, the highest number of people that were renting [59] space at that house at one time?
A. Four people.
Q. I'm including the back yard in that. What was the largest number of tenants that you had in the house and in the back yard?
A. Five.

Q. Did you have any kind of a list anywhere in the house of who the current tenants were—

A. No.

Q. —back in February of 1998?

A. No.

Q. Did you have any kind of information as to how you could contact the tenants if you needed to?

A. No.

Q. Did you have any information as to who you should contact if there was any kind of an emergency with any of the tenants?

A. No.

Q. Would your—back in February of 1998, in that time frame, did your tenants receive mail at your house, if you know?

A. Yes.

Q. And where would that mail be delivered?

A. It was delivered to everybody in the house.

Q. Was there a central place for the mailman or mail person would leave all the mail or did the mail person go around to individual mail slots?

[60] A. I would personally put it in the room like under their bed and put their letters over there.

Q. So you would accept the mail and then you would take the mail into Mr. Romero's room and put it on his bed?

A. No, no, no. I never used to come inside his room and put it on his bed. Most of the time he wasn't in the house so the room was locked. And I used to put his mail under his door and just leave it there.

Q. Do you know whether your tenants had separate utilities or whether they're just one set of utilities coming into the house?

A. I don't understand that question.

Q. Okay. Do you know if your family paid for all the electricity that was used in the house?

A. No, I don't know.

Q. Your mother went to work on February the 3rd before the officers arrived; is that right?

A. Yes.

Q. Did you have any conversation with your mother before she left that day?

A. No.

Q. Do you remember her leaving that morning?

A. Uh-huh, yes.

Q. Did you wake up as she left the house that day?

A. Not really. I would have just hear her like getting [61] ready and then she would leave.

Q. And that would have been around 5:00 o'clock?

A. Yes.

Q. And then I assume you went back to sleep after that?

A. I was like half awake, sleeping and half awake. I wasn't awake when she left that morning.

Q. All right. And when the officers arrived, it's your testimony that you did not hear any knocking on the front door?

A. Yes.

Q. And you also did not hear anybody say "police officers, we have a search warrant, let us in."

A. I never heard that.

Q. It was a loud noise that awoke you; is that correct?

A. Yes.

Q. And you don't know for sure if that was a noise on the front door or a noise on the door to your bedroom; is that correct?

A. Yes.

Q. And you never saw more than one officer in your room the entire time you were in your room?

A. I never did.

Q. How long would you estimate it was between the time that the officer first entered your room until the time that an officer took you to the garage?

A. About like five or ten minutes.

[62] Q. And was the officer who entered the room the same officer who put handcuffs on you?

A. Uh-huh, yes.

Q. And was the officer who put handcuffs on you the same officer who took you to the garage?

A. Yes.

Q. And you're sure of that.

A. I'm not sure. But I couldn't look behind me if they changed persons, if they changed officers.

Q. Would that be while you were walking?

A. Yes.

Q. While you were in the room for that five to ten minutes, could you see the officer?

A. No, it was dark.

Q. Could you see anything at all in the room during those five to ten minutes?

A. As I remember, the person who put the handcuffs on me, he had a mustache.

Q. What went on for that five to ten minutes while you were in the room?

A. I was told to stand up and turn over and I did. He grabbed my hands to put the hand—when I stood up, he pushed me back into my bed and he grabbed my hands to put the handcuffs on me. And he picked me up by my shirt and then he took me out of the room to the living room to get into the garage.

[63] Q. I guess my confusion is that what you just described sounds like something that would have occurred in a relatively short period of time and I'm trying to understand what occurred over that five- to ten-minute period. So let me break it down into parts for you.

Between the time that the officer entered and the time that you were handcuffed, how much time do you think elapsed?

A. It was fast.

Q. Okay. Between the time that you were handcuffed and the time that the officer led you out of the room, how much time elapsed?

A. It was fast too.

Q. So when you said before that you were in the room for five to ten minutes, was that an error?

A. I couldn't tell you how much time it took because it took fast.

Q. All right.

A. It was fast.

Q. Let me try this then. If you're laying in your bed and the officer comes through the door and comes over and handcuffs you, you said that occurred fairly fast. Would that be a matter of seconds?

A. No, not seconds.

Q. How long would you say it took for the officer to get the handcuffs on you?

[64] A. I don't know.

Q. Can you give me any estimate whether it was a half a minute or five minutes?

A. No.

Q. None at all?

A. No, not at all.

Q. Can you give me any estimate as to how long it took the officers to grab you by your shirt after he handcuffed you and walk you out the door?

A. That was right away.

Q. As soon as you were handcuffed, he grabbed you by the shirt and picked you up and walked you out to the garage?

A. Uh-huh, yes.

Q. Yes?

And the shirt that you were wearing was a black long-sleeved shirt?

A. Yes.

Q. It wasn't a T-shirt?

A. No.
Q. And you had sweat pants on?
A. Yes.
Q. And then at some point in time officers brought you shoes and a jacket.
A. Yes.
Q. Was the officer that walked you to the garage the same [65] officer that stayed with you in the garage?
A. No.
Q. That would be a different officer?
A. Yes.
Q. How many officers stayed with you in the garage?
A. Only one.
Q. Did you ever see more than one officer in the garage with you?
A. No, only one.
Q. When you got to the garage, were Shawn and Leticia and Marcos already there?
A. Yes.
Q. And where were they seated, if you remember?
A. I think Shawn was sitting on the chair. And Leticia was sitting on the bed. And Carlos was standing.
Q. If you look at Exhibit 61, can you tell me what part of this room Leticia was seated in?
A. I think she was on the second bed.
Q. And the second bed was in what area, was it on this wall (indicating)?
A. Next to where it says bed first.
Q. It would have been right next to Bed 1?
A. It was just a little space in between them and then there was the other one.
Q. If I asked you to come down here and draw exactly where [66] you remember the beds to be, could you do that?
A. Yes.

MR. NYE: Your Honor, may she?

THE COURT: Yes. You may step down.

MR. NYE: I'm going to grab a marker.

THE COURT: Let's do it in red.

BY MR. NYE:

Q. Draw where the two beds—and if there is any other furniture that you remember in that room, can you show us where that was too.
A. I think a little bit right here was one bed. And then another one here. And right over here there were a door. And over here was another piece of furniture against this wall.
Q. All right. Thank you.

MR. NYE: Just for the record, she's indicated in red two rectangles, one on the north wall and one just south of that object as being the beds. She's indicated a rectangle on the east wall which she described as a piece of furniture.

BY MR. NYE:

Q. Is that correct?
A. Yes.
Q. And a small rectangle also on the north wall. But on the west side that I believe you said was a chest or—
A. Like a drawer.
Q. A drawer. Okay.

[67] The garage was divided in half; is that correct?

A. Yes.
Q. And there was a solid wall between the two rooms?
A. Yes.
Q. And the door to the garage had been permanently fixed so it was more like a wall with a door, a big door?
A. Yes.
Q. And then there was a small door that entered into the front of the garage?

A. Yes.

Q. And a small door that entered into the back of the garage; is that right?

A. Yes.

Q. You've got the two beds drawn and I realize this isn't to scale, but you've got them both almost within the doorway. Were they spread out more in the room than you've drawn or were they pretty much scrunched up against that wall?

A. What was the question again?

Q. Sure. Were the beds on this side which would be the north side, were they on the north side of this half of the garage or were they more centered in the garage?

A. They were more to this side.

Q. To the north side?

A. Yes.

Q. Thank you.

[68] Now, when you got to the garage, was Shawn handcuffed?

A. Yes.

Q. And was Leticia handcuffed?

A. Yes.

Q. Was Marcos handcuffed?

A. Marcos wasn't there. Carlos.

Q. I'm sorry, Carlos. My mistake. Was Carlos handcuffed?

A. Yes.

Q. Did you know that Carlos was not a legal immigrant?

A. No.

Q. And you said you moved from the first bed to the second bed at some point in time; is that correct?

A. Yes.

Q. And I believe your testimony was that was within 15 minutes to a half an hour of going to the garage; is that correct?

A. Yes.

Q. Well, let me just ask you fresh, how long would you estimate it was from the time that you got to the garage to the time that you moved from the first bed to the second bed?

A. About half an hour, 15 minutes.

Q. Half an hour or what?

A. 15 minutes. I'm not sure. I didn't have a watch with me.

Q. What happened during the time before you moved from [69] the first bed to the second bed?

A. I think they were asking everybody if there were illegal aliens and if they had identification with them that could prove that.

Q. Was the police or people from immigration that were doing that?

A. I don't remember who it was.

Q. Let me ask you this: Do you remember if the immigration people talked to you for the first time when you were sitting on the first bed or on the second bed?

A. No, I don't.

Q. You didn't—strike that.

Did you have any physical contact with any of the police officers while you were in the garage?

A. What do you mean by physical contact?

Q. Did any of them touch you or pick you up or move you in any way?

A. No.

Q. Other than when they put handcuffs on you and when they took the handcuffs off of you, did any of the officers have any physical contact with you?

A. No.

Q. Were you wearing a watch that day?

A. No.

Q. Was there any kind of clock or anything in the garage [70] that helped you judge the time?

A No.

Q. Did you have any conversations with the officers in the bedroom, in your bedroom while you were still in the bedroom?

A. Just I remember him asking my name and my date of birth and where I was from. And he asked me if I was a legal alien too.

Q. That was the first officer in the bedroom, correct?

A. Uh-huh, yes.

Q. And could you see his face?

A. Yes.

Q. Could you make out what he looked like?

A. I would remember back then but I can't remember now.

Q. Was it so dark in your room that you couldn't see what he was wearing?

A. What room?

Q. Your bedroom. Did you understand that we were just talking about your bedroom?

A. No. I thought you were talking about the garage.

Q. Okay. Well, let's back up then. While you were in your bedroom with the first officer, did you have any conversation with that person?

A. No.

Q. Nothing was said by you or him other than—strike that.

Was anything said by the officer at any time while he [71] was in the room?

A. Other than to stand up and turn over and put my hands behind my back.

Q. Nothing else was said.

A. No.

Q. How about with the officers in the garage, did you have any—strike that—the officer in the garage, did you have any conversation with the officer in the garage?

A. Just what I said already about him asking my name and where I was from.

Q. All right. Did you ever complain to the officer about the handcuffs being too tight?

A. Yes, I did.

Q. Did you tell him specifically they were too tight?

A. Yes. Let me-think about it. Yes, I think I did. Can I say something?

Q. Yes, please.

A. I also asked them why he couldn't take them off.

Q. But as you sit here today, do you remember specifically telling the officer that the handcuffs were too tight?

A. I don't remember that.

Q. Do you remember any conversation with the officer about the handcuffs other than asking him why they had to stay on?

A. No.

Q. Do you remember which bed you were sitting on when the [72] video was taken?

A. I think it was the second bed.

Q. And do you remember the officer that took the video or the person that took the video?

A. I think it was a lady with curly hair.

Q. Did she talk to you at all?

A. No.

Q. At some point you were taken back to the living room; is that correct?

A. Yes.

Q. And the handcuffs were taken off?

A. In the living room, yes.

Q. Do you recognize either of the two officers that are seated here at the table with me?

A. No, I don't remember them.

Q. Do you have any recollection of talking to the officer that's seated at the far end of the table whose name is Muehler?

A. No.

Q. But some officer in the living room described to you the procedure that you could go through to get the city to come out and repair the damage to your house; is that correct?

A. What do you mean by describing?

Q. Did they tell you what to do, who to talk to, how to go about the process?

A. No. He just told me that I needed to talk to the City of [73] Simi Valley and they would replace all the stuff for me.

Q. Now, as you sit here today, as I understand it, you cannot recognize or recall the officer who you say broke the door in the converted bedroom; is that correct?

A. Yes.

Q. And you looked at the pictures of the officers here and you were not able to pick it out?

A. No. I can't remember their faces.

Q. Okay. Do you remember at your deposition that you looked at the picture of Officer Allegra and said that he was the officer that broke the door; do you recall that?

A. I remember picking some of the police officers that I remembered. But right now it's been so long that I can't remember their faces.

Q. My question is: When your deposition was taken, were you certain at that time when you looked at the picture of Officer Allegra that that was the officer that broke the door?

A. Yes, I believe it was.

Q. Can you describe for me exactly what Officer Allegra did with that piece of door that you have told us about?

A. There were pieces of the door outside. And he picked it up. He threw it back on the door and he started kicking it with his feet and saying that he liked to broke that kind of material, that it was cool and that it felt like it was cardboard.

[74] Q. Did the piece break up into smaller pieces?

A. I think so.

Q. And the piece was originally laying on the floor outside of the bedroom; is that correct?

A. Yes, it was.

Q. He picked it up and threw it back into the bedroom; is that correct?

A. Not in the bedroom. On the floor.

Q. So he picked it up off the floor and threw it back onto the floor?

A. Yes.

Q. And then started kicking it?

A. Yes.

Q. And exactly what did he say?

A. He said I like to break this kind of material. It's cool. It feels like cardboard.

Q. And you remember that.

A. Yes.

Q. And you saw this while you were seated on the first bed in the garage; is that correct?

A. Yes.

Q. The reason that you had locks on most of the cupboards and so on in your house was because you didn't trust your tenants; is that correct?

A. Yes.

[75] Q. The boxes that were in the living room, you indicated that those boxes contained clothing that was going to be donated to a charitable cause; is that correct?

A. Yes.

Q. Do you know why Mr. Romero would have had a baseball bat in one of those boxes, if he did?

A. No.

Q. The door into your bathroom, —strike that.

The bathroom I take it was left open for people to use?

A. Yes.

Q. Was the door into the bathroom unlocked the day the officers came out and served the search warrant?

A. Yes.

Q. Was the door into the bathroom broken?

A. No.

Q. You said when you moved into the house you were 14 years of age?

A. Uh-huh, yes.

Q. It's your recollection that the converted bedroom which is this little bedroom here on the porch (indicating), that was there when you moved in?

A. Yes. You said that I was 14. I was 16 when I moved into the house.

Q. I'm sorry.

A. Yes.

[76] Q. So you were 16 but the porch was still there, correct, when you moved in?

A. Yes.

MR. NYE: I'd like to read from the witness' deposition, Page 39, Lines 4 through 8.

THE COURT: 39?

MR. NYE: Page 39, Lines 4 through 8.

THE COURT: Okay.

MR. MULLER: No objection.

MR. NYE: "THE WITNESS"—

THE COURT: Okay, wait a minute. You'd better ask the question that preceded the answer that she gave.

MR. NYE: All right. We'll go back to Page 38 then. Let me see here.

THE COURT: Go back to Page 38 and it's Lines 11 to 13.

MR. NYE: "Question: From the time that you arrived in the garage to the time that they called immigration, did you hear any of the officers say anything?

"Answer: Just the sounds that they were making moving things around in Ray Romero's room. And the guy that I told you that he was breaking the door at the room that my dad made on the patio."

MR. NYE: I have no further questions.

THE COURT: Okay. How long will your redirect be?

MR. MULLER: I think it's going to be very short, Your [77] Honor.

THE COURT: Okay. Let's finish that and then we'll take a morning break, ladies and gentlemen.

REDIRECT EXAMINATION

BY MR. MULLER:

Q. To the question of identifying that officer who broke the piece of the door, do you remember when your deposition was taken in this case?

A. No, I don't.

Q. Do you remember if it was a long time ago?

A. I know it was a long time ago.

Q. Do you remember it was about a year and a month after the search on February 3rd, 1998?

A. I don't know that it was exactly a year and some months.

Q. Well, was your memory better, was your memory of the incident better about a year and a month after the incident?

THE COURT: Better than it is today?

BY MR. MULLER:

Q. Than it is today.

A. Yes, it was better back then.

Q. The bathroom door, did that have a padlock on it?

A. No.

Q. Was that usually left shut or usually left open?

A. It was usually left open.

Q. When you were in the garage, did you ever see any other [78] officers come into the garage briefly and leave it?

A. Yes, all the time.

MR. MULLER: I don't have any further questions.

THE COURT: Okay. Thank you. You can step down, Ms. Mena.

THE WITNESS: Thank you.

THE COURT: Now, we'll take a 15-minute break at this point, ladies and gentlemen. I will see you back in 15 minutes.

(JURY EXCUSED)

THE COURT: Everyone may be seated. Counsel, one of the jurors and I'm not even sure who, I'll ask the clerk to tell us—

THE CLERK: Number 7.

THE COURT: All right. Juror Number 7 handed a note to the clerk and I'll read it. "Language problems, question, question, question, open against vs. with padlocked equals closed, without padlock equals open. Was door wide open, question, or was door without padlock, question." I construe this note to be an indication that this juror thinks there may have been some uncertainty about the questions and answers that were given presumably by Ms. Mena.

I have not, as you know, preliminarily instructed the jurors as to notes. I will tell them that the only way they can communicate with the court is by a note. A juror, I'm not sure if it was the same juror but presumably it was, started to

* * * *

[150] one another, I had no idea.

Q. Well, did you have any belief that Ray Romero was related to the people who lived on Patricia Avenue?

A. I had no idea of knowing one way or the other.

Q. Well, weren't you, didn't you go over to Ray Romero's family home and talk to him—excuse me, talk to his family on Cimmaron?

A. I talked to his mother and brother, yes.

Q. And when you talked to them, didn't they indicate to you that the Patricia Avenue address was what they termed a poor house where multiple unrelated people or multiple parties lived?

A. As I stated a minute or two ago, they informed me that multiple individuals lived at that residence.

Q. Okay. And they never said oh, you know, he's living there with his cousins or he's living there with his father or living there with a brother. They never said that, did they?

A. No.

Q. So wasn't it your natural conclusion that Raymond Romero was living at Patricia Avenue with people unrelated to him and that in general this poor house that it was described, as Patricia Avenue was described, was a place where unrelated people were renting rooms?

MR. NYE: Objection; compound.

THE COURT: Sustained.

BY MR. MULLER:

* * * *

[162] Q. Are you differentiating actual sit-down meetings from other types of meetings?

A. Well, a meeting to me is something formalized.

Q. Well, did you have seven or eight informal meetings with people in preparation for the search warrant service?

A. I believe I met with numerous individuals several times, yes.

Q. Well, do you recall meeting with Officer Lappin seven or eight times before the search warrant service?

A. I'm sure that's easily yes.

Q. Cimmaron Avenue was the other home that was searched, the Romero family home; is that right?

A. Yes.

Q. And you knew that Raymond Romero who was the dangerous suspect might be at the Cimmaron address; is that correct?

A. I had no way of knowing which address he would be at.

Q. Right. And I didn't say that you did. I just said you knew he might be there; is that right?

A. Yes.

Q. You called for a soft knock at Cimmaron. What is a soft knock?

A. A soft knock is just like it sounds. You go up to the front door, knock or ring the doorbell and wait for a response.

Q. Now, when you did the search at Patricia Avenue, did you have any information that anyone who lived at the residence [163] other than Ray Romero was involved in the drive-by shooting?

A. I'm sorry, at the Patricia address?

Q. Patricia, yes.

A. No.

Q. What were your duties in regards to the search of Patricia Avenue?

A. My job as the case agent was to make sure that everyone had search assignments in conjunction with officer, at that time Officer Brill's direction, and numerous other duties.

Q. Okay. And as case agent, did the ultimate control of officers in the area fall on you?

A. The ultimate control?

Q. Yes.

A. The ultimate control goes to a supervisor.

Q. All right.

MR. MULLER: I would like to read from his deposition, Page 26, Lines 4 through 5.

MR. NYE: I would request that the entire paragraph be read, Your Honor.

THE COURT: Yes, it will be. And you can't read mid-sentence much less mid-paragraph, Mr. Muller.

MR. MULLER: Okay. So I'll start at Line 1, Your Honor?

THE COURT: Yes.

BY MR. MULLER:

[164] Q. "Answer: I was the case agent on scene where Sergeant Chambers, Lieutenant Thomas, I believe Captain Wright at the time of the incident when the actual search warrant was served, as I was the case agent, the ultimate control of officers in the area fell on me."

So it that correct that the ultimate control of officers in the area fell on you?

A. For searching assignments and the like, yes.

Q. You were in charge of the search.

A. I was in charge of directing individuals along with Officer Brill.

Q. During the search.

A. Correct.

Q. All right. After SWAT had cleared Patricia Avenue, what did you do?

A. After SWAT had cleared Patricia Avenue, I entered the residence and ascertained if, number one, anyone was hurt whether on the entry team or any individuals inside and ascertained if everything was Code 4 which means everything was calm and the risks were minimized.

Q. And after that, at some point you assigned search teams or was that Officer Brill who assigned the search teams?

A. I believe it was Officer Brill and I stood by while that happened.

Q. Did you do a walk-through of the home before assigning [165] the search teams—or excuse me, before Officer Brill assigned the search teams?

A. Yes.

Q. And during that walk-through, did you determine which room was being occupied by Ray Romero?

A. No.

Q. Did your walk-through occur before or after the first segment of the video tape was shot?

A. My walk-through occurred before the video tape was shot.

Q. How much before or how long was it before the video tape was shot that you made your walk-through?

A. I assume a couple of minutes.

Q. Now, when you made your walk-through, did you go into the pink room and see clothes that you would associate with a young man?

A. No, sir.

Q. Did you see a calendar on the wall with soccer players on it?

A. No. My walk-through consisted of merely walking from room to room.

Q. All right. Well, when you went into the pink room, did you see that?

A. No.

Q. When you went into the first bedroom, the one that's been identified as the Mena bedroom on the diagram, did you see that [166] it was full of women's clothes?

A. I saw it was full of clothes and other items.

Did you notice cosmetics and perfumes on a table in that room?

A. I noticed items on, I assume it was a dresser.

Q. When you did your walk-through, did you notice refrigerators—excuse me, a refrigerator in the Mena bedroom?

A. Yes.

Q. Did you notice a refrigerator in the pink bedroom, the Romero bedroom?

A. At the time I did the walk-through? No, I did not.

Q. Did you notice a refrigerator in the converted bedroom or what's been described as the converted bedroom? Let me refer to it.

A. I know which one it is. And at the time I don't believe I made any observation. I don't recall.

Q. Did you do any walk-through of the trailers or the mobile homes that were in the back of the residence?

A. Walking through actually as in entering them? No. I walked to them and stuck my head in the door.

Q. Okay. And when you stuck your head in, did you see that the mobile home was a separate unit with its own bathroom and stove, oven—well, probably not an oven but its own bathroom and stove and sleeping area?

A. I observed there was a camper.

[167] Q. So it was a typical camper with all those things in it.

A. It was a camper, yes.

Q. All right. After you did your walk-through, you then assigned or Officer Brill then assigned search assignments. At the time that Officer Brill made the search assignments, did you know which room was Romero's?

A. No, I did not know.

Q. Did you have a belief as to which room was Romero's when Officer Brill made the search assignments?

A. I don't believe so at the time, no.

Q. How long from the start of the search were you informed that Ray Romero's room had been located?

A. I believe it was 10 to 15 minutes.

Q. So pretty quickly after the search started, you knew which room was inhabited by Romero.

A. It was within 10 to 15 minutes.

Q. Did you have enough officers to search every room simultaneously?

A. I believe we brought the adequate number of personnel.

Q. No. My question was: Did you have enough officers to search each room simultaneously?

A. I believe so, yes.

THE COURT: Okay. We'll take a break now and resume tomorrow precisely at 8:00 o'clock. I appreciate your punctuality this morning. And we will keep to the same schedule

* * * *

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 98-8512-AHM

IRIS MENA, *et al.*,
Plaintiffs,

-v-

CITY OF SIMI VALLEY, *et al.*,
Defendants.

THE HONORABLE A. HOWARD MATZ,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
FRIDAY, JUNE 15, 2001

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

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[5] Romero, you had your search team continue to search rooms inhabited by other people, correct?

A. Yes.

Q. After you entered the home initially, did you encounter any of the residents of the home?

A. Yes.

Q. And did you make any orders regarding the residents in the home?

A. Yes.

Q. What were they?

A. To have them moved to one central location.

Q. Did you order that they be placed in a secure area so they were not an interference to the searching officers?

A. Yes, that would be one central location.

Q. Right. So they wouldn't be an interference to the searching officers.

A. Correct.

Q. And that was the garage of 61A.

A. The garage, yes.

Q. And the residents, including Iris Mena, would not have been an interference to the officers because the garage was not inhabited and had already been searched when you placed them in there, correct?

A. The reason they were placed in there is because we had secured that area and we were not searching that area because it [6] was empty.

Q. Right. Well, you had made a cursory search and determined there was nothing in there, right?

A. I had done a walk-through.

Q. So at the point in time when you had placed Iris Mena in that security location where she couldn't be an interference with any police officers and after she had been identified and patted down, did you order her released from her handcuffs?

A. No, sir, I did not.

Q. Were you informed that same morning of the search that Ray Romero had been contacted at the Cimmaron address of his family?

A. I'm sorry. The question was sometime during that morning?

Q. Yes.

A. Or during the search.

Q. During the search. During the search.

A. I don't recall during the search, no. Sometime during that morning I was notified.

Q. I would like to refer you to Exhibit 12. Can you tell the jury what Exhibit 12 is.

A. It is a citation.

Q. And who is it to?

A. Raymond Romero.

Q. What kind of citation is it?

[7] A. It's for possession of less than ounce of marijuana issued at 2646 Cimmaron.

Q. And is this—this is a notice to appear, correct?

A. Correct.

Q. So this means Mr. Romero was not arrested on that date. He was just told that he had to appear in court for this marijuana citation some other date?

A. He was arrested. It's a non-custodial arrest.

Q. Right. Okay. What I mean by arrest is he wasn't taken into custody that day.

A. He was not booked.

Q. And I'm placing Exhibit 12 on the Elmo. Now, this citation and notice to appear was issued to Ray Romero at 8:30 a.m.; is that correct?

A. That's what it reflects. I was not there.

Q. But based on your experience as a police officer, the time listed on the citation would be the time that it was issued to the person.

A. Based on what I see on that citation that you've shown, that's the time, 8:30.

Q. So he would have been cited and released at 8:30.

A. Again, I was not there.

Q. Well, following normal police procedures when someone's issued a citation, he would have been cited and released at 8:30?

[8] A. I can't comment on Officer Juliani's procedure which he'd done that particular day.

Q. Okay. I'm not asking you what he done. I'm just saying pursuant to normal police procedures, he would have been cited and released at 8:30 on that date, correct?

A. Again, I can't answer that.

THE COURT: When you cite someone in the normal course of your duties as a police officer in the normal course after you issue the written citation, do you release that person?

THE WITNESS: Yes. And I can comment on what I normally do.

THE COURT: Okay. Just answer my question. That's what you normally do, right?

THE WITNESS: Yes.

THE COURT: And when you normally do that, it's because you believe that's the normal procedure that Simi Valley police officers follow when they issue a citation. The citation gets issued, the individual gets released; is that correct?

THE WITNESS: Correct, the minute they sign it.

THE COURT: You may proceed, Mr. Muller.

BY MR. MULLER:

Q. So he was released. If normal police procedures were followed, Ray Romero was released at 8:30.

A. Again, normal police procedures, that is the second line, 8:30 would be going from left to right, top to bottom,

she wrote [9] 1st February; again normal police procedure, she wrote February and then she wrote 8:30. However long it took her to write the citation, explain the citation, the procedures for him to go to court and have him sign, again, I can't comment. But 8:30 is when she started the citation.

Q. Okay. So it would have been pretty soon after 8:30 that he would have been released?

A. Again, however long it took her to finish that citation and explain it to him.

Q. Do you know what time Iris Mena was finally released from her handcuffs?

A. I believe, I can only guess shortly after the hour and 45 minutes that we were there.

Q. It would have been after the video tape, the second video tape was taken which ended at 8:57?

A. Shortly thereafter.

Q. And your tactical plan indicated that the plan for people encountering the residents was that they would be detained, handcuffed until they could be patted down, their location noted, field interviewed and released by Officer Muehler or Officer Brill; is that correct?

A. Which page of my tactical plan on evidence Item 11 are you referring?

Q. Oh, okay. It would be Page—well, let me show you this blowup of 11A of your tactical plan. Or if you want to, you can [10] look in your plan and find this page.

THE COURT: What page is it? Just answer his question.

MR. MULLER: Well, I was looking through but I wanted to short circuit that. Page 5. I'm also putting up a blowup of Page 5.

BY MR. MULLER:

Q. Do you have Page 5 in front of you?

A. Yes, sir.

Q. So your plan was in regards to people who were encountered, they would be handcuffed and detained until they could be patted down, their location noted, field interviewed which basically consists of taking their name and other brief information about them, and released by Officer Muehler or Officer Brill; is that right?

A. That's correct.

MR. MULLER: No further questions.

THE COURT: Thank you.

Mr. Nye.

MR. NYE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. NYE:

Q. Good morning, Officer.

A. Good morning.

Q. Officer, you've told us that you were instrumental in obtaining the search warrant for 1363 Patricia; is that correct?

* * * *

[14] A. Yes, sir.

Q. And were you also present during the call that was made, the 911 call to 1363 Patricia?

A. Yes, sir. I was not only present, I was on the line.

Q. And did you hear anything in Officer Brill's testimony that you considered to be inaccurate?

A. No, sir.

Q. Now, you had some information that Janero Gonzales either resided or had resided at 1363 Patricia; is that correct?

A. Yes.

Q. Where did that information come from?

A. That information had come from other contacts with West Side Locos gang members and information that we received from Ray Romero's brother and mother.

Q. All right. And did or does Mr. Gonzales, is he a member of the same gang as Mr. Romero?

A. Yes, sir, he is.

Q. Did that cause you any concern in regards to what you were doing in your investigation?

A. It causes me to heighten my, the threat level and it causes me as a gang expert to draw a conclusion or an inference if you will.

Q. And what was that?

MR. MULLER: Objection; unqualified opinion, 403.

THE COURT: Overruled.

[15] THE WITNESS: An individual place, if there is two rival gang members residing at the residence, me as a gang expert being court qualified, it would lead me to believe that, number one, has this become a safe house for West Side Locos and are there, and/or are there additional gang members living at that house in addition to the two that we've already identified.

Q. Now, you'd been to 1363 Patricia on two or three prior occasions?

A. Yes, sir.

Q. We've heard about a domestic violence incident and we've heard about a stabbing incident. What would be the other one if there was one?

A. Myself and Officer Brill had gone there just prior to the service of the search warrant wherein we had gone there at night and gone out on foot, walked the driveway if you will on the east side of the property separating 1363 and the adjacent property and we looked in the back yard.

Q. All right. You did not go inside the house on that occasion.

A. We did not step on the property, no.

Q. During the domestic violence and/or the stabbing incident, did you actually go inside the house?

A. Not on the domestic violence. On the stabbing I walked through the house and walked back out.

Q. And I believe there was some testimony on direct that you

* * * *

[27] notice on the front door?

A. Yes.

Q. Who was that?

A. It was assigned to Detective Lappin who obviously in turn assigned it to the Spanish speaker.

Q. Was there an assignment made for knock and notice anywhere in the rear yard?

A. Yes.

Q. Where was that—who was that?

A. Oh, who was that?

Q. I'm sorry.

A. I don't recall if it was Officer, at that time Officer Brill or Officer Adamsak. They were both Spanish speakers.

Q. And was there knock and notice to be given on the individual vans and motor homes that were in the rear yard?

A. Yes.

Q. And who was assigned that task?

A. Each individual detective that was at the location.

Q. Did you involve some other departments or agencies in this operation?

A. Yes, sir, I did.

Q. Which ones?

A. Immigration and Naturalization, INS/Border Patrol and Building and Safety.

Q. Why did you involve INS?

[28] A. Twofold. Part of my job in the special problem section was that I was the liaison with a wide variety of agencies including INS and code enforcement. In this particular instance, I notified INS that they might be needed

because West Side Locos were predominately and still are to this day predominately made up of illegal immigrants grants. [sic]

Q. And why did you involve building and safety?

A. I involved building and safety. Again, I didn't know whether or not I'd need them. I had them on call because I was liaison. I notified them to arrive at the scene because there was a wide variety of violations in regards to building codes and building safety.

Q. Now, did you give the direction to begin the operation at 1363 Patricia?

A. Yes, sir, I did.

Q. And did you coordinate that with the Cimmaron address?

A. Yes.

Q. And were you in a position to see whether or not knock and notice was given at the front door of Patricia Avenue?

A. Yes.

Q. Was it given?

A. Yes.

Q. Was it given much as has been described throughout the course of this trial?

A. Very loudly, yes.

* * * *

[31] A. 10 to 15 minutes.

Q. All right. Did that cause you to consider changing the search assignments?

A. Absolutely not.

Q. And why was that?

A. Because again, even though we had located the gang member's bedroom, we still don't know where in that residence he may have hidden something and again his relationship with the other occupants.

Q. Did you consider interviewing Ms. Mena to determine her relationship with Mr. Romero?

A. No.

Q. Why was that?

A. For a wide variety of reasons. Being that at this point it's not irrelevant but I don't know Ms. Mena. She seems like a very nice individual. I do not know the relationship again between her and Mr. Romero.

Q. If she had told you that she had no relationship with Mr. Romero, would that have altered your search pattern?

A. No, sir.

Q. Did you oversee the search?

A. Yes, I did.

Q. Did you see anybody doing anything that you thought was malicious?

A. No.

* * * *

[36] the wall and the cinder blocks falling.

Q. Was there any rebar that protruded after the cinder blocks fell?

A. No, sir.

Q. Now, in addition to documenting the damage in the report, was the damage also documented by photograph?

A. Yes.

Q. And you have seen Exhibit 52, have you not?

A. Yes, sir, I have.

Q. And do you know who took those photographs?

A. I believe our crime scene investigator Becca McConnell.

Q. And for what purpose were those photographs taken?

A. Twofold. To document the damage that we had done that day and basically to make sure that any additional damage that might come in later couldn't be attributed to us.

Q. The damage was also video taped; is that right?

A. Yes, sir, it was.

Q. Now, Iris Mena was detained during the course of this search, was she not?

A. Yes, sir, along with three other individuals.

Q. Were they all handcuffed?

A. Yes, sir, they were.

Q. Were they all kept handcuffed during the duration of the search?

A. Yes.

[37] Q. And is there a reason why that occurred?

A. Yes.

Q. Can you tell us what that is.

A. Yes. It's for our safety as well as the individuals that we encounter. They are much less likely, in my experience, they are much less likely to be involved and cause us to be involved in them. They are kept in a central location. They are, even though they're handcuffed, any discomforts they might have are addressed. And if an officer that had been watching them, if the individual had had a problem, they would have spoken to that officer and he would have come to me and I would have addressed it at that time.

The reason we don't unhandcuff a large group of people, because then it requires us to be, have numerous officers. We had two officers in that room watching four people. If we had unhandcuffed those people, I would have had between six and eight officers. It's unsafe and it prevents problems.

Q. Did one of the residents of 1363 Patricia identify him or herself to you as an illegal alien?

A. Not to me.

Q. To another officer?

A. Yes.

MR. MULLER: Objection; hearsay.

THE COURT: Sustained.

BY MR. NYE:

[38] Q. Did you enter the garage area at any time during the search?

A. While the search was being conducted? Yes.

Q. Yes. Did you see Ms. Mena while you were in the garage?

A. Yes, I did.

Q. Did she ever appear to you to be in any type of distress?

A. No, sir, none of them.

Q. Did she ever speak to you?

A. Not at that time, no.

Q. And your best estimation of the duration of the search is what?

A. One hour 45 minutes.

Q. And can you tell us what you base that on.

A. I base that on our arrival would have been at the front door. The knock and notice would have been at 7:00 a.m. and when we had left, Becca McConnell was the last individual that would have done the taping and that was 8:40 I believe.

Q. In her video we see some gloves scattered about the house, plastic gloves. Are those gloves that the officers used during the course of the search?

A. Yes.

Q. And do you know whether or not those gloves were retrieved before the last person left the house?

A. I would have been the last person and I would have picked them up along with the wide variety of evidence sticker backings [39] that we use.

Q. Did you do so?

A. Yes, I did.

Q. Did you see any of the officers that were present at 1363 Patricia do anything at all that you considered inappropriate on February 3rd?

A. No, sir.

MR. NYE: That's all I have, Your Honor.

THE COURT: Thank you.

Redirect examination by plaintiffs?

MR. MULLER: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. MULLER:

Q. When you were in the garage, did you speak to Iris Mena?

A. As stated, I don't believe so.

Q. So you never explained to her why she was being held when you went into the garage.

A. Not at that particular time, I did not.

Q. Your affidavit of probable cause didn't indicate which room was occupied by Raymond Romero, correct?

A. Did it specifically state which bedroom he had? No. I did not know which one.

Q. And do you understand that it's your duty to discontinue a search even if it's authorized by search warrant if you determine that there are separate units within a residence, is

* * * *

[44] Q. Did you see any doorbells on any of the rooms?

A. No.

Q. Any separate mailboxes?

A. No.

Q. Did you see any multiple addresses associated with the house?

A. No.

Q. Did any of the rooms have stoves in them other than the converted garage?

A. No.

Q. Any of the rooms have sinks in them?

A. No.

Q. Any of the rooms have a bathroom associated directly with it?

A. No.

Q. Any of the rooms have separate entries from the outside into the room?

A. No.

Q. Any of the rooms have a full-sized refrigerator as opposed to the little mini refrigerators that we saw?

A. One room.

Q. And that was Ms. Mena's bedroom?

A. Correct.

MR. NYE: Thank you.

THE COURT: I have a question, Officer. It's about [45] Something you told Mr. Muller earlier this morning when he asked you why you didn't question Iris Mena as to what if any relationship she had either to Romero or Gonzales. And you answered that you didn't know Ms. Mena and that was one of the reasons why; is that correct?

THE WITNESS: Yes, I didn't know the relationship.

THE COURT: Is it your practice when you're conducting investigations about reputed gang members to question people only if you know something about them or know the person to be questioned?

THE WITNESS: No, sir. The reason I was there that day was to do a search warrant, not an investigation.

THE COURT: Just answer my question, please.

THE WITNESS: Then I'll say no, not at that particular time.

THE COURT: In fact, it's common for a police officer in conducting an investigation to ask questions of someone that police officer never even saw before, correct?

THE WITNESS: Correct. When I'm doing an investigation. As stated, I wasn't.

THE COURT: All right. So the fact that you didn't know Ms. Mena and didn't know what her relationship was with either Romero or Gonzales, if you were folding ordinary practices, would not have prevented you from questioning her; is that correct?

[46] THE WITNESS: If I conduct an investigation, yes.

THE COURT: Thank you. Any further questions?

MR. MULLER: No, Your Honor.

MR. NYE: No, Your Honor.

THE COURT: All right. You may step down, sir. Please call your next witness.

MR. MULLER: Call Frank Ahlvers.

FRANK AHLVERS, SWORN

THE COURT: Please make sure, and this is to both counsel, that cumulative testimony and cumulative questioning be avoided.

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Frank Eugene Ahlvers, A-h-l-v-e-r-s.

DIRECT EXAMINATION

BY MR. MULLER:

Q. Good morning, sir.
A. Good morning.
Q. What's your current assignment with the Simi Valley police department?
A. I'm a property crimes detective.
Q. And what was your assignment back on February 3rd, 1998?

A. The day of the search warrant?
Q. Yes.
A. I was a SWAT team member.

* * * *

[55] the Simi Valley police department?

A. I was the unit manager for the special operations unit and the SWAT lieutenant.
Q. So you were in charge of the SWAT team?
A. That's correct.
Q. How did you get to be in charge of the SWAT team?
A. It was an assignment basically. I applied for it. Went through a review process. The chief of police determined that I would be the SWAT lieutenant.
Q. And did you receive any training specifically in regards to being the SWAT lieutenant?
A. Yes, I did.
Q. What training did you receive?
A. It was really quite extensive. It was a basic 40-hour SWAT course. There was a basic 40-hour crisis negotiation course, then a number of advanced SWAT management courses, 40 to 80 hours.
Q. So you're very familiar with SWAT procedures.
A. I would like to think so, yes.
Q. I'm going to refer you to Exhibit 11 in the notebook, Exhibit 11 in the notebook.
A. Okay.
Q. And Exhibit 11 is the tactical operations plan regarding the search at Patricia Avenue; is that right?
A. That's correct.
[56] Q. Exhibit 11 is not a SWAT operational plan, is it?
A. Special operations unit tactical operations plan.
Q. It's not a SWAT plan though, is it?

A. The plan contains virtually all of the identical information of a SWAT plan. This is labeled special operations unit. It's very similar, comparable to one that would be entitled a SWAT plan.

Q. Would you look through the exhibits—.

THE COURT: Excuse me one second. Would you please remove the item from the Elmo. Thank you.

BY MR. MULLER:

Q. Would you look through that exhibit and see if it sets forth the duties of the different SWAT team members in regards to the incident at Patricia Avenue.

A. Yes, it does.

Q. It lists the duties of the SWAT team members in regards to the incident?

A. Yes.

Q. And can you show me where.

A. Yes. On Page 05, one, two, third paragraph down states:

> "A SWAT six-man entry team will clear the interior of the residence and secure any subjects. The SWAT team will clear only the interior of the residence to include the screened porch at the rear of the house. The SWAT team will not exit the residence and no [57] officers will enter the house until all clearing teams have provided a Code 4 to Officer Muehler."
>
> And this has been verified by Officer Muehler.

Q. Okay. Does it set forth the different duties of the SWAT team members, individual members?

A. Not specifically, no.

Q. Now, does that lead you to believe that there was a separate plan, a separate SWAT plan regarding Patricia Avenue?

A. No.

MR. MULLER: I would like to read from the lieutenant's testimony at Page 85, Lines 9 through 18.

THE COURT: You may do so.

"Question: Would you look through that and see if that exhibit sets forth the duties of the different SWAT team members in regards to the incident.

"Answer: I have already reviewed this with city's counsel and it does not.

"Question: Okay. And is that proper?

"Answer: It leads me to believe that there is a separate plan that we just don't have available to us that was written for the SWAT team."

Now again, would you look at Exhibit 11 and note, I'm going to specifically refer you to I believe it's Page 3. It has the list of personnel. Do you see that?

A. Yes.

* * * *

[60] MR. MULLER: Lines 22 through 25.

THE COURT: Through Page 14, lines what?

MR. MULLER: 1 through 11.

THE COURT: Hold on, please. You may do so.

BY MR. MULLER:

Q. Question: It would be consistent with Simi Valley police department policy not to have a SWAT operations plan for a SWAT-executed search warrant?

"Answer: No.

"Question: It's not consistent?

"Answer: No, it's not.

"Question. So it wouldn't be proper.

"Answer: It would not be consistent with policy. I, my assumption is that there was one. I don't have an independent recollection or the norm would be there would be an operations plan listing specific SWAT assignments."

BY MR. MULLER:

Q. Now, in executing a search warrant, is it standard operating procedure for the search team to place any residents in the living room or some place like the living room and handcuff all of them until it is determined, which ones might be disruptive?

A. Yes.

Q. And normally those who are uninvolved or non-violent will [61] have their handcuffs removed.

THE COURT: Is that a question?

BY MR. MULLER:

Q. Is that correct?

A. No.

MR. MULLER: I'd like to read from the deposition Page 36, Lines 21 through 25 and Page 37, Lines 1 through 15.

MR. NYE: Your Honor, I'd request that if that's going to be read that we read through Lines 21, not just Line 15.

THE COURT: You want to come through Line 21?

MR. NYE: Yes, Your Honor, please.

THE COURT: That's appropriate. You may read it but add to it the lines through Line 21.

MR. MULLER: Yes, Your Honor.

BY MR. MULLER:

Q. "Question: What would it be about their behavior that would cause you to handcuff them?

"Answer: Well, initially everyone is handcuffed. So let me withdraw my previous answer. Everyone is handcuffed until there's some determination made on the potential threats to the individual officers or the potential involvement. When the officers first go in, they don't know who the good guys are and who the bad guys are. Therefore, they're going to treat everybody and they're going to control everybody for [62] Their own safety.

"Once they're brought to a location and it's determined that they're uninvolved, the norm would be that the uninvolved people or the non-violent people, handcuffs are taken off and they're placed on a couch and they sit there until we're done with the search warrant.

"Question: Okay. And why would you take the handcuffs off uninvolved people once the determination is made that they're uninvolved?

"Answer: The understanding of the officers at the time, their professional judgment, their values."

THE COURT: Don't you want to continue through the next series of questions or maybe you should ask a question now to see whether you're entitled to.

BY MR. MULLER:

Q. To keep a cooperative person handcuffed would be unnecessary, correct?

A. Not necessarily.

MR. MULLER: I would like to read from Page 39—excuse me, Page 39, halfway through Line 24 through Line 25, Page 40, Lines 1 through 10 omitting the objection.

THE COURT: You're starting with Page 39, what line?

MR. MULLER: Halfway through Line 24.

THE COURT: You don't start midway through a question.

[63] MR. MULLER: All right. I'll start at Line 22.

THE COURT: Okay. Go ahead.

BY MR. MULLER:

Q. Okay.

"Question: Okay. I'm entitled to your knowledge as a police officer. I'm not telling you to second guess the investigators. What I'm saying is given a situation where an uninvolved person is not disruptive, does not show that they will be violent, does show that they are amenable to verbal commands, would it be improper to keep that person handcuffed for over two hours?

"Answer: I don't know that I would use the word improper. I would certainly believe that it would not be necessary given the specificity of the circumstances you've described."

Now, based on your training and experience, your position as the head of the SWAT team, would it be the responsibility of the case agent to make the determination as to who should be detained and how long they should be detained during a search?

A. Yes.

Q. And the case agent was Officer Muehler in this case?

A. Yes, I believe he and now Sergeant Brill, then Officer Brill were co-case agents.

MR. MULLER: No further questions.

* * * *

[66] MR. MULLER: Objection; lacks foundation.

THE WITNESS: No.

THE COURT: That objection I overrule.

THE WITNESS: None whatsoever.

BY MR. NYE:

Q. In fact—strike that.

Would you defer to the judgment of the officer in the field as to whether or not a person should or should not be handcuffed?

A. Absolutely.

Q. Do you think that you can sit here and determine whether or not something that occurred two or two and a half years ago was proper or not?

MR. MULLER: Objection; leading, lacks foundation.

THE COURT: It's leading. Sustained.

BY MR. NYE:

Q. What specifically was your involvement in the development of the tactical operations plan?

A. Essentially overall unit management and review approving was an ongoing discussion of the entire investigation.

Q. And in that regard did you work with Officer Muehler?

A. Yes, I did.

Q. And also Sergeant Chambers?

A. That's correct.

Q. Did you agree with the decision to use SWAT at this [67] particular location?

A. Absolutely.

Q. Why was that?

A. The potential for violence, the fact that we were searching for a weapon. We believed that there was a potentially armed individual at a specific location. He had already proven a proclivity for armed violence and that he

had fired a shot in a gang-related situation at another individual. It just made common sense. The basic premise behind using a SWAT team is to minimize the potential for a violent reaction by using an overwhelming force initially to discourage any violence.

Q. And did you review the tactical operations plan that was used?

A. Yes,I did.

Q. Did you make any changes to it that you recall?

A. Minimal if any. It was very well done.

Q. Was there any need at all for a separate SWAT operations plan in this particular operation?

A. No.

Q. You were at the scene on February the 3rd, you've told us.

A. Yes, I was.

Q. Who else was there from a supervisory level?

A. My immediate supervisor, Captain Dick Wright was there.

* * * *

[69] said at your deposition could be used at any trial of this matter?

A. Yes.

Q. And do you recall me admonishing you that for that reason you should give your best testimony at your deposition?

A. Yes.

Q. And in regards to the dangerousness of the people encountered on the morning of the search, the people who were actually there as opposed to the people that lived there, there were four people there; is that your memory?

A. I don't remember specifically how many were there.

Q. Do you remember any of the people there fitting the criteria for gang membership?

A. Do I remember anybody? I don't have that independent recollection, no.

MR. MULLER: Okay. No further questions.

THE COURT: Anything further?

MR. NYE: No.

THE COURT: I have a question for you.

THE WITNESS: Yes, sir.

THE COURT: You told Mr. Nye that—and I think this was a quote—you would defer to the judgment of the person in the field absolutely; do you remember saying that?

THE WITNESS: Yes.

THE COURT: Well, just because an officer is in the [70] field does not entitle that officer's exercise of judgment to go unreviewed, does it?

THE WITNESS: No, of course not.

THE COURT: In fact, your responsibility as a superior officer in the police department is to review the conduct in the field of subordinate police officers, right?

THE WITNESS: That's correct.

THE COURT: And if their conduct in the field reflects judgment that is poor, it's your responsibility to discipline them, correct?

THE WITNESS: That's correct.

THE COURT: And if the poor judgment is reflected in behavior that may violate the constitutional rights of citizens, that's also your responsibility to review, correct?

THE WITNESS: That's correct.

THE COURT: So you don't defer to the judgment of an officer just because he's the one on the spot who has the difficult decision in making a judgment call, do you?

THE WITNESS: No. I guess the point I was trying to make was that based on my knowledge and experience with the individual officers, my level of confidence with them, the fact that I believe they're professional police officers, I'm certainly not going to micro manage their minute-by-minute decisions.

If they decide that an individual needs to be [71] handcuffed and there's nothing that is obvious to me that a person shouldn't be, I'm going to accept their decision and not have to second guess everything they do.

Q. Okay. Well, what would cause you to conclude that the person should not be handcuffed or that if the person has been handcuffed, at some point those cuffs should be released?

THE WITNESS: What would make me conclude that they should be? I guess after—

Q. That the cuffs should be removed.

A. That it was very apparent that they were an uninvolved party to whatever we were doing at the particular time.

THE COURT: Okay. And one way of finding out whether they were an involved or an uninvolved party would be to ask them questions, right?

THE WITNESS: That's correct.

THE COURT: And it's perfectly common when officers are executing a search warrant and have taken into custody and handcuffed people who happened to be on the premises,

for those officers responsible for the execution of search warrant to question those people as to whether they're involved. That's common practice, isn't it?

THE WITNESS: At a certain point in time, yes, of course.

THE COURT: Nothing about the fact that you have a responsibility for executing a search warrant prevents you from [72] questioning the people who happen to be on the premises as to what if any involvement they have with the person who is being investigated, correct?

THE WITNESS: Yes, sir.

THE COURT: Thank you. Any other follow-up questions?

MR. MULLER: No, Your Honor.

THE COURT: You may step down.

MR. NYE: Your Honor—

THE COURT: Do you have any questions?

MR. NYE: Yes, please.

THE COURT: Please proceed.

FURTHER CROSS-EXAMINATION

BY MR. NYE:

Q. Lieutenant, have you reviewed the reports and documents in this particular case?

A. I believe I have reviewed most of them, yes.

Q. Did you see anything in any of the reports and documents that you reviewed to question the judgment of Officer Muehler at the scene on February the 3rd, 1998?

A. No.

Q. If you were to question a person detained at this particular location during this particular event and that person was to inform you that in his or her opinion they're not at all involved in what's going on around, would that in and of itself cause you to release the person from handcuffs?

[73] MR. MULLER: Objection; incomplete hypothetical and leading.

THE COURT: Overruled.

THE WITNESS: No.

THE COURT: Thank you.

THE COURT: All right. Anything further?

MR. MULLER: Nothing further, Your Honor.

THE COURT: Thank you, sir. You may step down.

MR. MULLER: We call to the stand—

THE COURT: Okay. We'll take a break now. We'll take a 15-minute break. We're not going to start at 10:00. We're going to start at five to 10:00. So it will be a 15-minute break using this clock as the standard. And remember the admonition during the break, please.

THE CLERK: All rise.

(JURY EXCUSED)

THE COURT: How are we doing on scheduling and are we going to be able to accommodate Mr. Chambers?

MR. MULLER: Absolutely, Your Honor. We're—Alan McCord is out.

THE COURT: You're not calling him to the stand.

MR. MULLER: Yes. I told him yesterday he's out. Garcia is out. Randy Adams is out. We've got Allegra, McConnell and Roy Jones left.

THE COURT: And Chambers.

* * * *

[77] A. Yes.

Q. Those three adult males that you saw at Patricia Avenue, did they fit the criteria for gang membership?

A. I wouldn't be able to tell you.

Q. Did any of those three adult males appear to be gang members?

A. As concerned to their mode of dress or how they appeared, no, they did not appear to be gang members.

Q. So none of them fit the criteria for gang membership that you've been trained in?

A. That I can't answer, sir.

THE COURT: Don't belabor the point. He said they didn't look to him like they were gang members.

MR. MULLER: Yes, sir.

BY MR. MULLER:

Q. Was there a confrontation on that date with the people in the house on Patricia Avenue?

A. I wouldn't classify it as a confrontation, no, sir.

Q. I would like to ask you to look at Exhibit 19, please.

A. (WITNESS COMPLIES)

Q. Do you have that in front of you?

A. Yes, sir.

Q. Do you recall people acting aggressively toward you on that date?

A. There was certainly a potential for aggressiveness, yes, [78] sir.

Q. All right. Let me refer you to Page 5 of Exhibit 19, specifically to the middle of the first partial paragraph and see if that refreshes your recollection as to whether anyone acted aggressively towards you on that date.

MR. NYE: What's the reference again, counsel?

MR. MULLER: I'm asking him to look at the—let me count it down. The one, two, three, fourth full sentence of Page 5.

BY MR. MULLER:

Q. Does that refresh your recollection that people acted aggressively towards you on that date?

A. Well, sir, I didn't write this report. So this is the other officer's opinion.

Q. Right. I'm just asking you if it refreshes your recollection.

A. No, my independent recollection is fine.

Q. What's that?

A. My own independent recollection of this event, this doesn't help me at all.

Q. Okay. So do you recall anybody acting aggressively towards you on that date?

A. The three males that were there as described in the report, when Officer Lamb went to take Mr. Mena into custody, they stood up and starting walking towards us and they were [79] going to try to interfere.

Q. So you would agree that that's acting aggressively towards you.

A. I would agree.

Q. Okay. And did that behavior anger you?

A. No.

Q. Did you feel any animosity at all towards the people who lived on Patricia Avenue when you went and took part in the search warrant service on February 3rd, 1998?

A. No, sir. The three subjects did what I asked them to do that night.

Q. Well, what was your role during the search warrant service?

A. I was a containment officer.

Q. Did you ever enter the home?

A. Yes, I did.

Q. Did you ever come into the area of this converted bedroom that's indicated in Exhibit 61A?

A. I did have to walk by that room, yes.

Q. Did you ever note damage to a door there?

A. Yes, sir, I did.

Q. Did you ever pick up a piece of the door?

A. No.

Q. Did you ever kick a door there?

A. No, sir.

[80] Q. Did you ever make any remarks about the door that was there?

A. No, sir.

Q. Did you ever break a door there at the converted bedroom?

A. No, sir.

MR. MULLER: No further questions.

THE COURT: Go ahead, Mr. Nye.

CROSS-EXAMINATION

BY MR. NYE:

Q. Good morning, Officer.

A. Good morning, sir.

Q. The criteria for a gang member, is that something you can just look at somebody and determine whether or not they fit the criteria?

A. No.

MR. MULLER: Objection; leading.

THE COURT: Overruled.

BY MR. NYE:

Q. Now, you had been out to 1363 Patricia Avenue in 1997; is that correct?

A. Yes, sir.

Q. And that was a domestic violence call?

A. That's correct.

Q. And Mr. Mena was arrested on that date?

A. That is correct.

* * * *

[92] went into the home on Patricia Avenue?

A. I don't know.

Q. Now, back at this, the other call that you had at Patricia Avenue, in addition to Lamb, Officers Muehler and Brill were also present during that call; is that your memory?

A. I remember Officer Muehler being there.

Q. And you said you didn't connect the two locations until the date of the search?

A. That is correct, sir.

Q. Were you ever present at any briefings regarding the search?

A. The morning briefing just prior to the search, yes.

Q. And did you ever hear Lamb, Muehler or Brill talk about that prior visit that you had had to the location during that briefing?

A. No, I did not.

Q. Now, if you were, if someone were sitting on the—referring to Exhibit 61—if someone were sitting on this bed here on the north wall of the converted garage, could they have seen across to the front or in front of the converted bedroom?

A. If somebody was sitting there?

Q. Yes.

A. There wasn't anybody sitting there.

THE COURT: Just answer the question as to whether someone was sitting there.

[93] THE WITNESS: Well, as long as the door wasn't closed and no other officers or other people were standing in the way, they could probably see.

BY MR. MULLER:

Q. And do you recall seeing a portion of the door that had been taken off in this area right in front of the converted bedroom when you walked by there a couple of times?

A. You're moving around. I don't know which door you're talking about, sir.

Q. Well, do you remember a broken door in front of this converted bedroom that's listed on Exhibit 61A? A broken door right in this area in front of it.

A. Where the name Lappin is, is that where you're referring to?

Q. Around there where Lappin is.

A. No.

MR. MULLER: No further questions.

MR. NYE: Just briefly, Your Honor.

RECROSS-EXAMINATION

BY MR. NYE:

Q. Officer, you were outside for 20 or 30 minutes before you went into the house; is that correct?

A. That's correct, sir.

Q. And it was raining outside?

A. It was pouring.

[94] Q. Were you standing on concrete or in mud?

A. Standing on a dirt driveway.

Q. Did your feet get dirty?

A. Yes, sir.

Q. If you had gone into the house and kicked something and stomped on it, would you expect to have seen some dirt or mud from your shoes on that object?

A. Yes I would.

MR. NYE: Thank you.

THE COURT: Okay. Thank you very much, Mr. Allegra. You can step down.

THE WITNESS: Thank you, sir.

THE COURT: Please call your next witness.

MR. MULLER: Yes. Rebecca McConnell.

REBECCA MC CONNELL, SWORN

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Rebecca McConnell, M-c-C-o-n-n-e-l-l.

DIRECT EXAMINATION

BY MR. MULLER:

Q. Good morning, Ms. McConnell.

A. Good morning.

Q. What is your position with the Simi Valley police department?

A. I'm the crime scene investigator.

[95] Q. Are you a sworn employee or a civilian employee?

A. Civilian.

Q. You were assigned a task during a search warrant service on February 3rd, 1998?

A. Yes.

Q. And what was that task?

A. I was to video tape a search warrant.

Q. And when you say video tape a search warrant, you were supposed to video tape before the search was done and then do an video tape after the search was completed?

A. Yes. My purpose is to show the condition of the residence prior to searching and then the way it's left after the search is completed.

Q. And what time did you get to Patricia Avenue if you recall?

A. A short time before 7:00.

Q. And what time did you, if you recall, did you get inside of Patricia Avenue?

A. I believe it was—inside the residence?

Q. Yes.

A. About 7:15, 7:10, 7:15. That's an approximate. I don't have a clear recollection.

Q. And you did two video tapes of the residence; is that right?

A. One video tape but two separate tapings.

[96] Q. Okay. Now, in the first taping I note—you've viewed the tape, haven't you?

A. Yes.

Q. And do you know there's no time stamp on the first segment of the video tape?

A. Correct. I don't have the time at the beginning of the tape.

Q. Why is that?

A. I failed to turn it on. The buttons on the camera, there are two buttons, one for the date, one for the time. You can't show them both at the same time. I usually hit the date button and then switch to the time and then take them off so you have the full screen. And I just failed to hit the time button.

Q. Okay. And do you know if the time code on the video tape camera was accurate?

A. Yes.

Q. Do you recall what time your second video tape segment ended?

A. It was just before 9:00 a.m.

Q. How long were you at the residence total?

A. About two hours.

Q. Are you sure it wasn't two to three hours?

A. No, it was two hours.

Q. From the time that you pulled up to the time that you left, how long was it?

[97] A. About two hours.

MR. NYE: I'd like to read from the deposition, Page 25, Lines 12 through 15.

THE COURT: All right. You may do so.

MR. MULLER: I'm sorry. I have actually 10 through 15, Your Honor.

THE COURT: All right. You may do so.

BY MR. MULLER:

Q. "Question: How long had you been at the residence?
"Answer: Two to three hours I think.

"Question: How long—let me withdraw that. How long had you been at the location from the time that you pulled up until the time that you left?

"Answer: That would have been two to three hours."

And were there still officers at Patricia Avenue when you left?

A. Yes.

MR. MULLER: No further questions.

CROSS-EXAMINATION

BY MR. NYE:

Q. Good morning.
A. Good morning.
Q. How long have you been with the Simi Valley police department?
A. It will be 14 years in August.
[98] Q. And you've been a crime scene investigator that entire time?
A. No.
Q. What else have you done for them?
A. I started out as a police aide.
Q. What are the duties and responsibilities of a crime scene investigator?
A. My main responsibility is all the evidence documentation, gathering and processing it at major crime scenes.
Q. Your testimony was that you arrived at the scene at about 7:00 a.m.?

A. Just prior to 7:00 a.m.
Q. All right. And when your deposition was taken, had you reviewed the video to determine what the time was when you concluded your video?
A. No, I had not. And in fact, in the deposition a little later on I state I wasn't sure about the time and I had to review the tape to remember that.
Q. All right. And having reviewed the tape, are you certain now that you were there for two hours and not three hours?
A. Yes.

MR. MULLER: Objection; leading.

THE COURT: Overruled.

BY MR. NYE:

Q. And the purpose of the video tape is what?
[99] A. To document the condition of the residence prior to searching the rooms and how it is left after the search is completed.
Q. All right. And did you also take some still photographs while you were there?
A. Yes.

MR. NYE: May I approach the witness, Your Honor.

THE COURT: You may.

BY MR. NYE:

Q. Let me show you Exhibit 52 and ask you if you recognize those photographs?
A. Yes.
Q. Are those the photographs that you took?
A. Yes.
Q. And what was the purpose of taking the photographs depicted in Exhibit 52?

A. The same as the video, to docket the condition, any damage that is incurred in the serving of the warrant.

Q. As part of your video taping, you went out into the garage towards the end and video taped the garage.

A. Yes.

Q. Do you recognize Ms. Mena here?

A. No, I don't.

Q. Do you recall there being people in the garage when you did the video tape?

[100] A. Yes, I do.

Q. Did anybody say anything to you?

A. No.

Q. Did you hear anybody else say anything to any of the people in the room while you were doing the video taping?

A. No.

Q. In looking at your video tape, at the end we see here and there throughout the house rubber gloves. Did you see any rubber gloves while you were in house doing the second video tape?

A. Yes.

Q. Did you see—when you finally prepared to leave the house, did you see anything happening to those gloves?

A. Just prior to my leaving, some of the people that were left there were putting them in a pile, cleaning them up so that they weren't left.

Q. How would you describe the condition of the house during the first video tape?

A. The condition of the structure or the belongings in it?

Q. The belongings.

A. The belongings. The main room inside the front door was sparsely furnished. There were a few boxes. One of the bedrooms was extremely cluttered, had a lot of furniture, a lot of belongings. There was one bedroom that was empty and one that just had some furnishings.

[101] Q. The one that was extremely cluttered and had a lot of belongings, would that have been the first bedroom off the right?

A. That's correct.

MR. NYE: Thank you. I have no further questions.

MR. MULLER: No questions, Your Honor.

THE COURT: I have a couple questions.

The video that had been played here in the trial, Ms. McConnell, doesn't have any audio. Does the camera and video equipment that you used that day have audio capacity?

THE WITNESS: It has that capacity, yes.

THE COURT: Did you not turn on the audio?

THE WITNESS: The only time I use audio is if I'm video taping an interview.

THE COURT: Just tell me whether you did that day.

THE WITNESS: No, I did not.

THE COURT: And the reason is why?

THE WITNESS: I don't use the audio under that capacity.

THE COURT: Why not?

THE WITNESS: Because I'm showing a condition. I don't want people to be intimidated by the camera being there. So I shut it off so if anybody wants to have conversations, they may.

THE COURT: All right. If there were statements being made by police officers that might have a bearing on how [102] reasonable was their conduct, if the audio were on, that would be a way to capture whatever those statements may have been; is that correct?

THE WITNESS: I suppose so, yes. Usually when I'm walking through with the camera, everybody's quiet. Because like I say, a camera intimidates people and they don't want to be captured on tape.

THE COURT: Okay. And the intimidation factor would apply to all kinds of people, both civilians and law enforcement officers?

THE WITNESS: Yes. The residents of the house, the law enforcement officers or civilians. Anybody. I don't like being video taped.

THE COURT: Okay. Thank you.

MR. MULLER: No questions.

THE COURT: You may be excused. Thank you.

Please call your next witness.

MR. MULLER: Yes. Your Honor, I'd like to briefly recall Iris Mena to the stand.

MR. NYE: Excuse me. There is one officer waiting outside. Are you aware of it?

MR. MULLER: I will call the other officer first if that's the preference.

THE COURT: Yes, call the other officer first.

ROY JONES, SWORN

* * * *

[112] were several officers present. I know he was one of them.

MR. MULLER: No further questions.

THE COURT: Thank you, Officer Jones. You are excused.

THE WITNESS: Thank you, sir.

THE COURT: Next witness, please.

MR. MULLER: Yes. I'd like to recall Iris Mena.

THE COURT: All right. I'll permit you to do so. Please step forward.

IRIS MENA, RECALLED

THE COURT: I remind you that you were previously sworn and you have an obligation to testify truthfully. Do you understand that?

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. MULLER:

Q. Ms. Mena, just a few questions for you. There were four—three other people detained with you that day in the converted garage?

A. Yes.

Q. And who were they?

A. Shawn, Leticia and Carlos.

Q. Do you know approximately how old Carlos was at that time?

A. I think a little bit after 40.

Q. And do you know approximately how old Shawn Hynes was at [113] that time?

A. I don't know. No, I can't tell you.

Q. And what about Leticia, do you know approximately how old she was?

A. She was probably like 50.

Q. And did any of those people act in any threatening way towards the police as they sat there in the converted garage?

A. They never did.

Q. And how long were you held there in handcuffs for the total of that search?

A. I would say like two to three hours.

Q. When—at some point in time you moved back to your parents' home after you and your husband separated; is that right?

A. Yes, I did.

Q. And when was that?

MR. NYE: Your Honor, I'm going to object. This has all been asked and answered in the original questioning.

THE COURT: Sustained.

BY MR. MULLER:

Q. When you moved back in with your parents, was Janero Gonzales living at your home?

A. No, he wasn't.

Q. And was that in 1997 when you moved back with your parents?

[114] A. It was like October 1997.

Q. When you were brought out of your bedroom initially when the man came in with the gun pointing at you and handcuffed you, after you got outside your bedroom door, did you see any police officers?

A. Yes. There were like two to three police officers dressed in black holding like a big long tube to get into the other rooms on the hallway.

Q. When you say "a big long tube," can you describe it any better than that.

A. They were holding it from the top and it was like, I forgot the name, how you guys called it over here.

Q. I just want to know what you saw.

A. It was like a big black pipe that they were holding.

Q. Did it have anything on top of it?

A. Like handles. They were holding it like this (indicating).

Q. Okay. Did you see them doing anything with that metal thing?

A. No. Because I asked them what was going on when I saw that and they told me to shut up and keep moving.

Q. Okay. And where did you go after you saw the officers with that pipe thing?

A. To the garage.

MR. MULLER: No further questions.

[115] THE COURT: Mr. Nye.

MR. NYE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. NYE:

Q. Ms. Mena, you never testified before during your deposition about officers in the house with a pipe or a ram, did you?

A. I don't remember if I did.

Q. And you never testified before during your deposition that when you were brought out of your room that officers told you to shut up, did you?

A. I don't remember if I did.

MR. NYE: I have no further questions.

THE COURT: Okay. You may step down, Ms. Mena.

MR. MULLER: I have one question.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. MULLER:

Q. Has hearing this evidence brought back memories of the incident, hearing people testify about it?

A. Yes, it did.

MR. MULLER: No further questions.

THE COURT: Okay. You may step down.

THE WITNESS: Thank you.

THE COURT: Please call your next witness.

* * * *

[117] factors and there's a witness who is, someone that the plaintiff wants to put on who can't be here until 12:00. And I'm going to permit the plaintiff to put that witness on at 12:00. So the plaintiff is not resting. Once a party rests, then that means that party is not permitted to put on additional evidence until the next stage, if any. But we are going to start with the defendant's case independent of the testimony that was previously elicited and for that purpose I'm going to permit Mr. Nye to call—who is it, Mr. Muehler?

MR. NYE: Officer Muehler.

THE COURT: Officer Muehler.

DARIN MUEHLER, RECALLED

THE COURT: I remind you, sir, that you're under oath and you have the obligation to testify truthfully.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. NYE:

Q. Officer Muehler, you did not question Iris Mena while she was being detained in the garage; is that correct?

A. That's correct.

Q. If Iris Mena had told you that she was not at all involved with Mr. Romero, would that have changed your course of conduct that day?

A. Absolutely not.

THE COURT: I thought you asked him that. Yes, you [118] did. But go ahead.

BY MR. NYE:

Q. Why is that?

A. Because I was there to conduct a search warrant. She resided at the resi ce so the fact that she was involved with that particular residence, it would not have changed my behavior.

Q. Are there circumstances that would have caused you to take the handcuffs off of her on that date?

A. Yes.

Q. What would that have been?

A. Had she been the only occupant in that residence, had she been gravely disabled, had she been obviously pregnant, had she been elderly, those type of things, health concerns.

Q. Okay. Under the facts and circumstances that existed on February the 3rd of 1998, did you feel any need to remove the handcuffs from her during the detention?

A. Absolutely not.

MR. NYE: Thank you. That's all I have, Your Honor.

THE COURT: Mr. Muller?

MR. MULLER: No questions, Your Honor.

THE COURT: Okay. Thank you, Officer.

THE WITNESS: Thank you.

THE COURT: Okay. So you don't have any more witnesses, right, other than the one that's coming on Tuesday

* * * *

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 98-8512-AHM

IRIS MENA, *et al.*,
Plaintiffs,

-v-

CITY OF SIMI VALLEY, *et al.*,
Defendants.

THE HONORABLE A. HOWARD MATZ,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
TUESDAY, JUNE 19, 2001

LYNNE SMITH
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

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[3] INDEX TO WITNESSES

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Alan McCord				
By Mr. Nye	7			
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Matthew Brill				
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By Mr. Muller		18		
Joseph Callanan				
By Mr. Nye	24		75	
By Mr. Muller		53		81

* * * *

[65] an incomplete hypothetical and misstates the witness' testimony.

THE COURT: Overruled. He can answer on his own.

THE WITNESS: I can't answer that question as you put it to me. There's not enough information.

BY MR. MULLER:

Q. Well, did you read his deposition?

A. Yes, sir.

Q. And did you read the part of his deposition where he discusses when it would be proper, when it would be necessary to keep a person handcuffed during a search?

A. I read his deposition that was dated June 15th of '99. I read it in its entirety. I don't have recall of everything that was in that deposition.

Q. Well, if Lieutenant Thomas testified at that deposition that normally those who are uninvolved or nonviolent will have their handcuffs removed during the search, would you disagree with his assessment of proper procedure?

A. I'm not sure you're giving me enough information to agree or disagree.

Q. Would you agree if Lieutenant Thomas testified that to keep a cooperative person handcuffed would be unnecessary?

A. Again, there's not enough information for me to comment on.

Q. Would you agree that all of the testimony that you ever read in this case indicated that Iris Mena was completely [66] cooperative during the search?

A. Yes.

Q. Would you agree that all the testimony that you read in this case indicated that Iris Mena never did anything threatening at all during the search?

A. Yes.

Q. Now, you indicated that someone who is detained during the service of a search warrant could be released after it was determined if they were part of the incident that was the cause for the search or any of the collateral investigation and after the location had been rendered safe; is that right?

A. Yes, sir.

Q. So the SWAT entry was made and the location was cleared of all suspects or residents of the location; is that right?

A. Yes.

Q. So that after SWAT came in and eight officers or was it six, six officers came in and went through the location, got everybody out, the location was safe?

A. Yes.

Q. At that point in time after Ms. Mena was handcuffed, she was taken to a garage, a converted garage where she was sat down with two officers; is that right?

A. That's my reading, yes.

Q. And at that point in time when she was taken to the garage, she could have been asked questions to determine if she [67] was part of the situation that caused the search or the collateral investigation that was involved in the search.

A. Could have, yes.

Q. There was nothing from preventing her?

A. I'm not—I don't know exactly when it could have happened. I wouldn't suggest it happens until the place has been rendered safe, the entire area has been rendered safe.

Q. You understand from the testimony that Ms. Mena is not brought out to the garage until SWAT has cleared the whole location, don't you?

A. Yes.

Q. So at that point in time that she's brought out to the garage, it's rendered safe.

A. Yes.

Q. All right. So knowing that once she's out in the garage, there's nothing preventing anyone from asking her questions to determine if she's related to this criminal investigation or the, what you call the collateral investigation.

A. And I don't think there's anything preventing that, no.

Q. And once someone determined that, it's your testimony that Iris Mena could have been released from her handcuffs; isn't that right?

A. I still stand by my testimony. Once you take care of all these other issues, yes, she could be released if she wasn't found to be involved in the original incident, in the collateral [68] incidents and perhaps she was willing to leave the location so that the officers could facilitate the search, they could release her, yes.

Q. Assuming that all those things were accomplished, they could have been accomplished within a couple of minutes after Iris Mena—not a couple of minutes, I don't want to exaggerate—within five or ten minutes after Iris Mena was brought to that converted garage.

A. That doesn't seem reasonable to me, sir.

Q. Well, you recall reading the tactical plan, don't you?

A. Yes.

Q. And the tactical plan was to field interview all of the residents of the home.

A. Yes.

Q. And a field interview is a very short, it's a very short document. It's actually a card, isn't it?

A. Oftentimes, yes.

Q. So filling out a field interview card would take a matter of five, ten minutes at most?

A. Oh, you could fill a so-called FI card out in a minute and a half if that was your goal to break the record as to how fast you could do it. But that doesn't comport with good police work under these conditions to be quite honest with you.

Q. Okay. Well, you would agree at the outside it should have taken 10 or 15 minutes after Iris Mena was brought into the [69] garage to determine, to ask her questions to determine whether or not she was involved in the crime that was being investigated at that time?

A. I disagree with that.

Q. Do you know if anybody asked Iris Mena any questions regarding the crime that was being investigated or the collateral investigation for the over two hours or approximately two hours she was held in that converted garage?

A. No, sir.

Q. You don't, you have never read any evidence that anyone did ask her any questions while she was in the garage?

A. I read a lot of material. I recall dialogue going on in her presence. I believe she testified to making certain announcements or responses. But I don't have a clear idea of what she said and for what purpose.

Q. You talked about opening, the need to open interior doors quickly.

A. Yes.

Q. Is using a hand-held ram one way to open an interior door quickly?

A. Yes.

Q. In fact, it's superior to using body parts?

A. It depends on the type of door. Rams defeat hard doors like exterior doors. They may be less effective on interior hollow doors. It's a judgment call.

* * * *

[83] would want to know those things. You would want to ask those questions but you would want to consider the nature of everything that is happening at the scene. That's apparent, so the desire to interrogate or interview may be put on hold until timing is better.

MR. MULLER: No further questions.

THE COURT: I have a couple of follow-up questions. I want to ask you about what's at issue in this case, which is reasonable and necessary conduct. You would agree that the standard in this case is not a standard of appropriateness as an expert would define it but whether or not the conduct was constitutional. Do you agree?

THE WITESS: I believe the court's focus, yes.

THE COURT: Do you recall constitutional conduct at all reasonable, correct?

THE WITNESS: I agree with that, Your Honor.

THE COURT: And do you think that one factor in determining whether something was reasonable would be whether or not somebody being handcuffed was short and small, would that be a reasonable factor?

THE WITNESS: No, that would not.

THE COURT: Would it be reasonable to determine how many people were present on the scene to determine whether or not their response would be necessary in the event handcuffs were removed?

[84] THE WITNESS: Yes.

THE COURT: In order to determine whether or not the person in handcuffs had some connection to the matter being investigated or the individual being investigated, would it be a reasonable thing to question that person?

THE WITNESS: Yes.

THE COURT: Any further questions, counsel?

MR. MULLER: No further questions.

MR. NYE: One moment.

(PAUSE)

MR. NYE: No further questions. Thank you.

THE COURT: Thank you very much.

THE WITNESS: Thank you, Judge.

THE COURT: Are there any additional witnesses?

MR. NYE: No, Your Honor. With that the defense will rest.

THE COURT: Thank you. Plaintiff is not going to seek to reopen; is that correct?

MR. MULLER: We are not seeking to reopen.

THE COURT: Ladies and gentlemen, the parties, both sides have rested. That means that the stage of the trial involving presentation of evidence is finished. We're going to take a 15-minute break. When we return, I will give instructions and explain the special verdict. We will then proceed to closing arguments. Please remember the admonition

* * * *

[97] This word that's missing is—or it's two words. It's "the officers" in the third line from the bottom.

Officers executing search warrants occasionally damage property in the performance of their duty. The destruction of property during a search does not necessarily violate the right under the Fourth Amendment to be free from unlawful searches. Only unnecessarily destructive behavior beyond that necessary to execute a search warrant effectively violates the Fourth Amendment.

Generally a police officer carrying out a search authorized by a warrant may be detain occupants of the residence during the search so long as the detention is reasonable. In determining the reasonableness of a detention conducted in connection with a search, you may look to all the circumstances, including the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee.

A detention may be unreasonable if it unnecessarily painful, degrading, prolonged or if involves an undue invasion of privacy. A police officer is required to release an individual detained in contained with a lawful search as soon as the officers' right to conduct the search ends or the search [98] itself is concluded, whichever is sooner.

It's the duty of the court to instruct you about the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered. If you find for plaintiff, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. This is true for each plaintiff.

Damages means the amount of money which will reasonably and fairly compensate a plaintiff for any deprivation of constitutional rights you find was caused by the defendant or defendants. You may consider the following: The nature and extent of any injuries or damage to property. Any mental, physical or emotional pain and suffering plaintiff may have experienced and which with reasonable probability will be experienced in the future. Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

If you find for plaintiff but you find that he or she has failed to prove actual damages, you shall return an award of nominal damages not to exceed $1. You are not to award damages for any injury or condition from which plaintiff may have suffered or may now be suffering unless plaintiff has established by a preponderance of the evidence that such injury or condition was proximately caused by defendant's conduct as a result of the incident that occurred February 3rd, 1998.

* * * *

STATE OF CALIFORNIA-COUNTY OF VENTURA

SEARCH WARRANT AND AFFIDAVIT
(AFFIDAVIT)

[Filed Feb. 6, 1998]

Officer Darin L. Muehler, being sworn, says that on the
(NAME OF AFFIANT)
basis of the information contained with this Search Warrant and Affidavit and the attached and incorporated Statement of Probable Cause, he/she has probable cause to believe and does believe that the property described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

/s/ Darin L. Muehler 01/29/98,
(SIGNATURE OF AFFIANT) (DATE)

NIGHT SEARCH REQUESTED YES☐ NO ☒

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF VENTURA: proof of affidavit having been made before me by /s/ Officer Darin L. Muehler that
(NAME OF AFFIANT)
there is probable cause to believe that the property described herein may be found at the locations set forth here and that it is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

☐ was stolen or embezzled
☒ was used as the means of committing a felony
☒ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery,

☒ tends to show that a felony has been committed or a particular person has committed a felony,

☐ tends to show that sexual exploitation of a child, in violation of P.C. Section 311.3, has occurred or is occurring;

YOU ARE THEREFORE COMMANDED TO SEARCH:

SEE ATTACHED:

AND TO SEIZE IT IF FOUND and bring it forthwith before me, or this court, at the courthouse of this court. This Search Warrant and incorporated Affidavit was sworn to and subscribed before me this 29 day of Jan. 1998, at 1:49 A.M./ P.M. Wherefore, I find probable cause for the issuance of this Search Warrant and do issue it.

/s/ [ILLEGIBLE],
(SIGNATURE OF MAGISTRATE)
NIGHT SEARCH APPROVED: YES☐ NO ☐

Judge of the Superior/Municipal Court, Ventura Judicial District

STATE OF CALIFORNIA-COUNTY OF VENTURA

SEARCH WARRANT AND AFFIDAVIT
(AFFIDAVIT)

[copy] [sw027-98]

Officer Darin L. Muehler, being sworn, says that on the
(NAME OF AFFIANT)
basis of the information contained with this Search Warrant and Affidavit and the attached and incorporated Statement of Probable Cause, he/she has probable cause to believe and does believe that the property described below is lawfully seizable pursuant to Penal Code Section 1524, as indicated below, and is now located at the locations set forth below. Wherefore, affiant requests that this Search Warrant be issued.

/s/ Darin L. Muehler 01/29/98,
(SIGNATURE OF AFFIANT) (DATE)

NIGHT SEARCH REQUESTED YES☐ NO ☒

(SEARCH WARRANT)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, POLICEMAN OR PEACE OFFICER IN THE COUNTY OF VENTURA: proof of affidavit having been made before me by /s/ Officer Darin L. Muehler that
(NAME OF AFFIANT)
there is probable cause to believe that the property described herein may be found at the locations set forth here and that it is lawfully seizable pursuant to Penal Code Section 1524 as indicated below by "X"(s) in that it:

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/s/ [ILLEGIBLE],
(SIGNATURE OF MAGISTRATE)
NIGHT SEARCH APPROVED: YES☐ NO ☐

Judge of the Superior/Municipal Court, Ventura Judicial District

LOCATIONS TO BE SEARCHED:

LOCATION #1:

2646 Cimmaron Avenue, City of Simi Valley, County of Ventura, State of California, which is further described as a two story, single family dwelling, off-white wood sided front, with off-white stucco sides, green trim, brown tile roof, with the front entrance located on the south side, and a metal basketball frame/hoop located on the north side of the front driveway. The house numbers "2646" are a green color similar to the house trim and are displayed on the off-white wooden boarding on the right side wall of the garage, facing the street. The numbers "2646" in black against a white background are painted on the raised curb to the right of the front driveway. To include all rooms, attics, basements, closets, storage areas, attached garages, and other parts therein; and the surrounding grounds and any storage sheds, detached garages, or out buildings of any kind located thereon, and any safes or locked boxes therein. Any vehicles that are registered to or belonging to occupants of the residence and that are on or adjacent to the property. See attachment "A" for Photos.

Searching officers are directed to answer the telephone and converse with callers who appear to be calling in regards to gang related activity and note and record the conversation without revealing their true identity. Searching officers are also directed to listen to, note and record any return calls to any phone numbers left on such devices and to converse with any person(s) who appear to be calling with regards to gang related activity without revealing their true identity. Searching officers are also directed to listen to, note and record any message left on any telephone answering device, tape recorder or digital pager located therein.

LOCATION #2:

1363 Patricia Avenue, City of Simi Valley, County of Ventura, State of California, which is further described as a single story, single family dwelling, blue wood siding to the front and sides, with an attached garage, white with wood siding located on the east side of the residence, gray composition shingles, white trim. The numbers "1363" in black against a white background are displayed in 3 locations on the front of the residence. To include all rooms, attics, basements, closets, storage areas, attached garages, and other parts therein; and the surrounding grounds and any storage sheds, detached garages, or out buildings of any kind located thereon, any safes or locked boxes therein. Any vehicles that are registered to or belonging to occupants of the residence and that are on or adjacent to the property. See attachment "B" for photos.

Searching officers are directed to answer the telephone and converse with callers who appear to be calling in regards to gang activity and note and record the conversation without revealing their true identity. Searching officers are also directed to listen to, note and record any message left on any telephone answering device, tape recorder or digital pager located therein. Searching officers may return calls to any phone numbers left on such devices and to converse with any person(s) who appear to be calling with regards to gang related activity without revealing their true identity.

THE PERSON OF: Romero, Raymond Joseph, Hispanic male, DOB: 06110179, 5'7", 155 lbs., brown hair, brown eyes, No CDL

FOR THE FOLLOWING PROPERTY:

1. Deadly weapons, specifically firearms including ammunition, casings, holsters and cleaning equipment, knives and accessories such as sheaths; evidence of street gang membership or affiliation with any street gang, paraphernalia to

include any reference to West Side Locos street gang, etc. Said items of evidence to include any drawings, writings, objects or graffiti depicting gang members' names, initials, logos, monikers, slogans, or mention of street gang membership or affiliation, activity or identity; any paintings, drawings, photographs or photograph albums depicting persons, vehicles, weapons, or locations which appear upon observation to be relevant to gang membership or association, or which depict items believed to be evidence in the case being investigated with this warrant or which depict evidence of any criminal activity; any newspaper clippings relating details of, or referring to any crime or crimes of violence; any address books, lists of, or single references to addresses or telephone numbers of persons who are determined to belong to or to be affiliated with any street gangs.

2. Items of personal property tending to establish the identity of person(s) in control of said premises and/or vehicle(s), including items of identification, utility and telephone receipts, prescription bottles, financial instruments/records, mail correspondence, keys, photographs and video tapes.

3. Stolen property

STATEMENT OF PROBABLE CAUSE

The facts of establishing probable cause for the issuance of this search warrant are as follows:

I am currently employed as a Police Officer by the Simi Valley Police Department (Ventura County, California) and am assigned to the Special Problems Section, dealing specifically with gangs/graffiti. My assignments with the Simi Valley Police Department have included D.A.R.E., Uniformed Patrol, S.W.A.T. Team, and my current assignment. I have been a Police Officer with the Simi Valley Police Department since 1988 and was a Senior Police Officer from 1992 through 1997, with Field Training Officer

responsibilities. I have investigated or have been involved in investigating thousands of crimes ranging from vandalism and petty theft, to ADW's, and Murder, including crimes related to gangs/graffiti. I completed numerous training classes and seminars regarding criminal investigation. I have also attended numerous training classes and conferences dealing specifically with gangs, gang sub-cultures, and gang investigations. I also attend monthly meetings of gang investigators, and am currently a member of the California Gang Investigators Association. I have interviewed numerous criminals, including gang members and learned how these individuals commit their crimes, conceal their criminal acts, and dispose of evidence and items pertaining to the commission of a crime.

I've interviewed gang members, ex-gang members, their families, girlfriends, associates, victims etc., regarding their motives, habits, and belief systems. I've reviewed court records, and Police records regarding criminal activity by numerous gang members and associates, specifically, those individuals in the West Side Locos street gang, of which Ray Romero is an active member. I've also spoken with probation and parole officers of numerous gang members regarding their habits, sub-culture, etc.

Furthermore, as a member of the Special Problems Section of the Simi Valley Police Department, I monitor the activities, membership and methods of operation of various street gangs throughout the City of Simi Valley, in particular, the West Side Locos and Varrio Simi Valley street gangs that exist in certain areas of the City of Simi Valley.

The West Side Locos street gang is a criminal street gang in that it is an ongoing organization involving 3 or more people, which possesses and uses a common sign or symbol, and which engages in a pattern of criminal activity. The West Side Locos street gang is a direct rival to the Varrio Simi Valley gang. In regards to this affidavit, the locations in

question are inhabited by Raymond Romero, a West Side Locos gang member or other members of the West Side Locos street gang. I also know, based upon my training and experience, that yelling out a gang name, or "flashing" a gang sign, or driving through a rival gang members neighborhood constitutes a challenge in street gang culture. And that street gang members commonly display their gang affiliation immediately prior to, during, or immediately following the commission of a crime against, or an affront to, a rival gang via hand signals, graffiti, or verbal expressions and that retaliation against a rival gang for doing such acts, most often always occurs following, what gang members view as a strong personal insult.

It has been my experience that gang members often hide the weapons used in such crimes, and other evidence associated with such crimes such as clothing and other paraphernalia in their homes, the homes of co-participants and the homes of fellow gang members, or in their vehicles. It has also been my experience that gang members typically do not purchase the handguns they use, or are prohibited from purchasing handguns due to their criminal records, or age. As such it is your affiants experience that gang members will steal handguns and weapons or trade narcotics for handguns and weapons.

Further, my experience indicates that most street gang members are known by street names or monikers to their fellow gang members, and that they frequently write their gang name, their street name, or moniker and the street names or monikers of their associates on walls, furniture, miscellaneous items or papers, both within and on their residences and within or on their vehicles. I know that gang members, especially Hispanic gang members, frequently adorn their bodies with tattoos, many of which declare their gang affiliation. Most gang members keep photographs and photo albums in which are depicted: (l) themselves and fellow gang members who are posing and displaying hand

gang signs which indicated gang identity or affiliation, (2) gang members or associates posing with weapons which are often used for criminal activities, (3) gang members or associates posing beside vehicles which are occasionally used during the commission of crimes, and (4) gang members or associates posing at locations which are occasionally used and known to be specific gang hangouts. Gang members also occasionally maintain scrapbooks or newspaper articles which describe crimes committed by or against their gang. They will also maintain phone books or address books which document the current addresses and phone numbers of gang members or associates. Furthermore, such evidence of gang membership and clothing are not normally disposed of, and therefore, are likely to be found at the locations to be searched, such as gang writings, belts, belt buckles, "rags" (handkerchiefs or bandanas), weapons, photographs, photo albums, posters, etc. It has also been my experience that gang members often keep weapons and gang paraphernalia at other gang members residences, particularly if the gang member in question is currently on probation or is the focus of a criminal investigation.

It has been my experience that gang members are obligated to retaliate for assaults by opposing gang members, and that in the course of doing so, gang members will arm themselves with a wide variety of weapons. It has also been my experience that within the gang sub-culture, the gang that originally committed the assault is well aware of this retaliation, and as such, will also arm themselves with weapons. I also know that gang members are obligated to assist their fellow gang members in efforts against rival gang members, and will arm themselves to this end. It is my experience from actually having observed these items during consent searches, probation searches and search warrants, the review of numerous gang investigations, and consultation with other gang investigators, that the items described in this affidavit are kept by gang members.

On 01/13/97 at approximately 2031 hours, while assigned to the Special Problems Section of the Simi Valley Police Department, myself and Officer R. Brill were dispatched to 355 Bonita Drive, in the City of Simi Valley, in regards to a "drive-by" shooting which had just occurred at that location. A vehicle description provided by the victims, was broadcast by SVPD, describing the suspect vehicle as a light green vehicle, possibly a Toyota Tercel. The victims had reported that the listed vehicle and its occupants had driven by the residence at 355 Bonita Drive, stopped and fired multiple shots from a handgun at individuals standing to the front of the residence and subsequently striking the residence itself, which was occupied by subjects. One bullet hole was located to the front of the residence, and three spent .22 LR cartridges were recovered from the street.

SVPD Dispatch provided additional suspect information, which named the possible suspects as West Side gang members, "Little Gato," "Delfino" and "Ray Romero." "Delfino" is Delfino Vasquez, a known West Side Locos gang member. While responding to the scene, SVPD Sr. Officer Hale advised SVPD dispatch that he observed a light green Toyota Tercel in the Chevron Gas Station, 2449 Sterns Street. Officer Hale advised SVPD dispatch that the vehicle was occupied by 3 Hispanic males. We responded to Sr. Officer Hale's location and subsequently assisted in the removal of Suspect-Ricardo Bravo, who was driving the vehicle, Suspect-Delfino Vasquez and Suspect-Raymond Romero who were passengers. Victim-Joel Quiroz, Victim-Brandon Nelson, and Victim-Melissa Garcia were transported to our location and all three victims identified the vehicle as the suspect vehicle. In addition to their identification, Victim-Brandon Nelson had stated that he had thrown a brick at the suspect vehicle. There was obvious damage to both sides of the vehicle, with pieces of the red brick still attached within the dented metal.

The suspects were transported to the Simi Valley Police Department and interviewed concerning this incident. Both S-Delfino Vasquez and S-Ricardo Bravo waived their Miranda rights and statements were obtained, including the subsequent location/recovery of the .22 caliber handgun used in this drive-by.

S-Bravo admitted to driving to this location with the intent to "box" VSV gang members who they know to live at the residence. S-Bravo stated that upon arriving to the front of the residence, his vehicle was struck with an unknown object. He said he continued driving; initiated a U-turn and drove by the residence a second time, at which point his vehicle was struck a second time by an unknown object. S-Bravo said the residence was fired upon by the passengers inside his vehicle. He said they then fled the area at a high rate of speed, with S-Bravo failing to stop for traffic signals. He said he knew that the handgun had been thrown from the vehicle, though he did not know where the handgun could be located.

S-Vasquez was interviewed and stated he, S-Bravo and S-Raymond Romero drove to 355 Bonita Drive with the intent of "boxing" Gabriel Reyes, a known VSV gang member. He said he and S-Bravo were aware that S-Raymond Romero was in possession of a handgun prior to them going to the residence. He said once they arrived, the vehicle was struck on the side by an unknown object. S-Vasquez stated they continued driving, turned the vehicle around, and upon approaching the residence a second time, was struck again by an unknown object. S-Vasquez said, it was at this point that S-Bravo stopped the vehicle to the front of the residence. S-Vasquez stated he exited and fired 3 rounds from a handgun at the residence. S-Vasquez stated prior to firing the rounds at the residence, he observed numerous subjects standing to the front of the residence. He said he observed the subjects fall to the ground as he fired towards them and the residence. S-Vasquez said they fled the area at a high rate of speed. He

said he subsequently threw the handgun from the vehicle in the area of Madera Road south of Los Angeles Avenue. The loaded handgun was subsequently located and booked into SVPD evidence:

S-Romero was interviewed and he refused to waive his rights. At the time of this traffic stop, S-Romero was located in the right rear passenger seat of the vehicle. Pursuant to the consent search of the vehicle, we located .25 caliber ammunition on the floorboard of the vehicle, where S-Romero was seated.

It should be noted that S-Ricardo Bravo, S-Delfino Vasquez and S-Raymond Romero are all members of the West Side Locos gang. This gang is a rival of the Varrio Simi Valley, of which some members reside at 355 Bonita Drive in the City of Simi Valley. S-Raymond Romero's gang moniker is "Gato", S-Ricardo Bravo's gang moniker is "Spooky", and S-Delfino Vasquez' gang moniker is "Sleepy."

On 01/14/98 Detective Jay Carrott and Detective Kathy Shatz, of the Simi Valley Police Department, responded to Ventura County Juvenile Hall and interviewed S-Ricardo Bravo and S-Delfino Vasquez regarding .25 caliber rounds which were located inside S-Ricardo Bravo's vehicle, as well as one bullet which was found in S-Ricardo Bravos pants pocket at the time of his arrest. A .22 caliber was used in this particular drive-by; however on 11/28/97, a .25 caliber handgun was utilized in a drive-by shooting which resulted in a Varrio Simi Valley gang member being shot. In that case, the gun was never recovered. In questioning these subjects, both individuals stated that S-Raymond Romero was in possession of a chromed .25 semi-automatic handgun in the afternoon hours of 01/13/98. Both subjects stated that they had viewed the handgun, and S-Raymond Romero provided three .25 caliber bullets to Ricardo Bravo, which we subsequently recovered. S-Ricardo Bravo and S-Delfino Vasquez also stated that S-Raymond Romero attempted to

discharge the .25 caliber handgun out of the window of the moving vehicle; however the handgun misfired. S-Raymond Romero directed S-Ricardo Bravo to drive the vehicle to Erringer Road and Fitzgerald Road, in the City of Simi Valley. Upon their arrival, S-Raymond Romero exited the vehicle, with the .25 caliber handgun, walked westbound on foot, and subsequently secreted the handgun at an unknown residence of a West Side Locos Gang member. It is your affiants belief that Raymond Romero may have retrieved this handgun since being released from custody in this case.

On 01/17/98, Varrio Simi Valley gang member, Gabriel Reyes, was in custody at the Simi Valley Police Department on an unrelated crime. He requested to speak with me regarding the drive-by shooting. He informed me that on 01/13/98, he and 3 other subjects had driven past rival gang member, Delfino Vasquez' residence. He told me that S-Delfino Vasquez, S-Ricardo Bravo, and S-Raymond Romero were standing in the front yard of the residence. Gabriel Reyes stated that the subjects were visibly angered and subsequently gave chase in S-Ricardo Bravo's vehicle. Gabriel Reyes stated they were able to evade the West Side Locos gang members and subsequently arrived at his address, 742 Ashland Avenue. Gabriel Reyes stated he and his associates were to the front of his residence for approx. one hour, when the light green Toyota Tercel, driven by S-Ricardo Bravo, with S-Raymond Romero seated in the right front passenger seat, and an unknown passenger in the rear of the vehicle. Gabriel Reyes said the vehicle drove westbound past his residence, and Gabriel Reyes stated S-Raymond Romero pointed a small caliber chromed handgun at he [sic] and the other subjects standing to the front of the residence. These statements together from two separate sources, with the same information, corroborate the fact that S-Raymond Romero, a known West Side Locos gang member, was in possession of a chrome .25 caliber handgun on 01/13/98, just several hours prior to the drive-by shooting. All of which

makes this a violation of 12025(b)(3) P.C./ gang member with a gun.

The residence at 1363 Patricia Avenue has been occupied by a known West Side Locos associate, Genaro Gonzalez Jr. This has been established through in field contacts by Simi Valley Police officers. Raymond Romero is known to be at this residence, and has been identified as currently living at this location, through information from a variety of sources. On 01/22/98, at approximately 1925 hours, myself and Officer R. Brill arrived at 2646 Cimmaron Avenue, contacted Anthony Romero and interviewed him concerning his brother, Raymond Romero. He was questioned at length concerning where his brother resides. He stated his brother lives on Patricia Avenue, although he was unsure of the actual address. He was asked to describe the house where his brother lives. He stated the residence was a "poor house," on Patricia Avenue. He stated that a "poor house" was a residence with a large number of subjects residing in a residence designed for one family. Anthony Romero further described the residence as being blue in color, with several "campers" in the rear yard. He further stated that Genaro Gonzales lived at this residence, though Anthony believed Genaro had moved to Mexico. Anthony also said that his brother comes to this address, 2646 Cimmaron Avenue, twice a week to do laundry. Anthony said his brother sometimes spends the night once a week, sleeping in his "old room," and that Raymond keeps some of his personal property of value, at this location, because Raymond believes these items would be stolen at the Patricia Avenue location. Anthony also stated that his brother will sometimes spend more than one night per week at the Cimmaron Avenue location, because it is a "nicer" place to stay than Patricia Avenue. We asked Anthony how he would contact Raymond and he said, "by phone." He was asked to provide us with the phone number and he provided, PH# 522-9437. We also asked to speak with Anthony's mother; however, Anthony advised us that his

mother was not at the residence, though she was expected shortly. We subsequently waited to the front of the residence for approximately 20 minutes until Patricia Romero arrived.

We interviewed Patricia Romero concerning her son, Raymond Romero, and she stated the following. She was informed that since the drive-by shooting, there has been retaliation from Varrio Simi Valley, in the form of assaults. We questioned her about "where" Raymond currently lives. She said Raymond does not live at the residence, though he does return to the residence to wash his clothes and spend the night on occasion. Patricia Romero said she knows Raymond lives on Patricia Avenue, though she did not know the address. She was asked if she knew Raymond's phone number and she subsequently provided us with phone number 522-9437. Patricia said she believed Raymond lives with Genaro Gonzales; however, she believed Genaro had moved out of the residence. She said Raymond may come to her residence perhaps once or twice a week, though rarely during the week. Patricia Romero stated she was not surprised by this recent event involving Raymond. She said, "I know, Ray is either going to be dead or in prison." She said that she would not mind, if in the future, we needed to come back to her residence regarding her son, Raymond. Both interviews were covertly tape recorded and the micro-cassette tape was booked into SVPD evidence.

On 01/26/98, utilizing the phone number 522-9437, which was provided by Patricia Romero and Anthony Romero, as belonging to S-Raymond Romero, I entered SVPD dispatch. I had SVPD dispatcher Phyllis Sparks dial this number and informed her to advise any subject who answered the phone that there was a problem with the "911" system on Patricia Avenue. I instructed Dispatcher Sparks to request that any subject answering her phone call, should dial "911" to verify the "911" information. Dispatcher Sparks did as requested and a Hispanic male answered the phone when she called,

PH# 522-9437. She explained that there was a problem with the "911" lines. She asked the Hispanic male if the address he was at was 1363 Patricia Avenue. The Hispanic male stated that the address was indeed 1363 Patricia Avenue, and he agreed to dial "911" to verify information with the "911" operator. The line was disconnected and SVPD dispatch received a "911" call almost immediately from 1363 Patricia Avenue. This information regarding the address appears on the "911" screen in SVPD dispatch, along with the incoming phone number of PH #522-9437, which was listed to Genaro Gonzales. A copy of the "911" printout is attached and is marked as attachment "C" for review.

Dispatcher Sparks verified the information with the Hispanic male and he stated that the information received on the "911" screen was correct in regards to the phone number and address. Being that the "911" screen showed that Genaro Gonzales resided at the residence, Dispatcher Sparks asked the Hispanic male caller if he was Genaro Gonzales. The Hispanic male said, "No. A friend." Dispatcher Sparks as [sic] the caller for his name, and the Hispanic male said, "Raymond." I was listening to this conversation on another extension in the SVPD dispatch center. It is your affiants belief that this subject was Raymond Romero. The phone number provided by Patricia Romero and Anthony Romero as belonging to S-Raymond Romero was verified, as was the address through the listed means, and 1363 Patricia Avenue is the true and correct address of Raymond Romero.

Anthony Romero, Raymond's brother is a West Side Locos associate and still resides at the Cimmaron house, maintains contact with his brother, and S-Raymond Romero still goes to the Cimmaron residence owned by his mother to this day. As such, it is your affiants belief that S-Raymond Romero will utilize his relationship with his brother to conceal the listed property at 2646 Cimmaron Avenue, or 1363 Patricia Avenue.

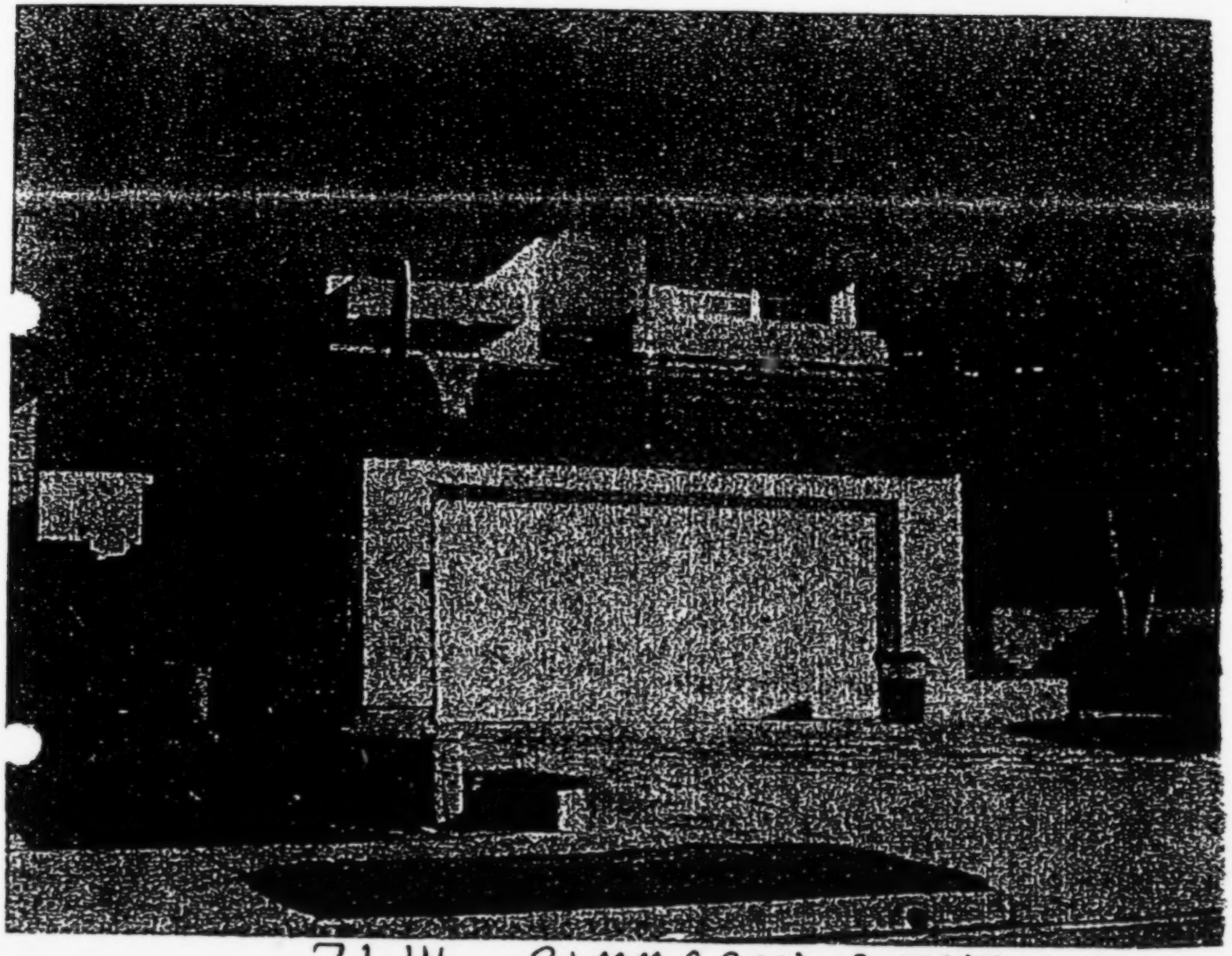
Despite the lapse of time between the commission of the crime and the anticipated service of this search warrant, your affiant believes that the weapon(s) used can still be found at the locations to be searched.

Your affiant believes that these are not the types of items normally disposed of after the commission of a crime and that they will therefore likely still be found in the locations or on the persons to be searched. Your affiant notes that whether or not the firearm sought is recovered, the above items would tend to show that a firearm existed and may have once been located in a place to which the suspect(s) have access, also that these items would tend to connect the suspect(s) with the weapons sought.

Your affiant states that the observations set forth in this affidavit include both the observations of your affiant and that of his fellow law enforcement officers as related to your affiant by them. Your affiant also states that the descriptions of the locations to be searched are based on the observations of these locations by your affiant.

Based upon the facts set forth in this affidavit, it is your affiant's belief that the items sought will be found at the place(s) indicated. Your affiant therefore respectfully requests this search warrant to be issued.

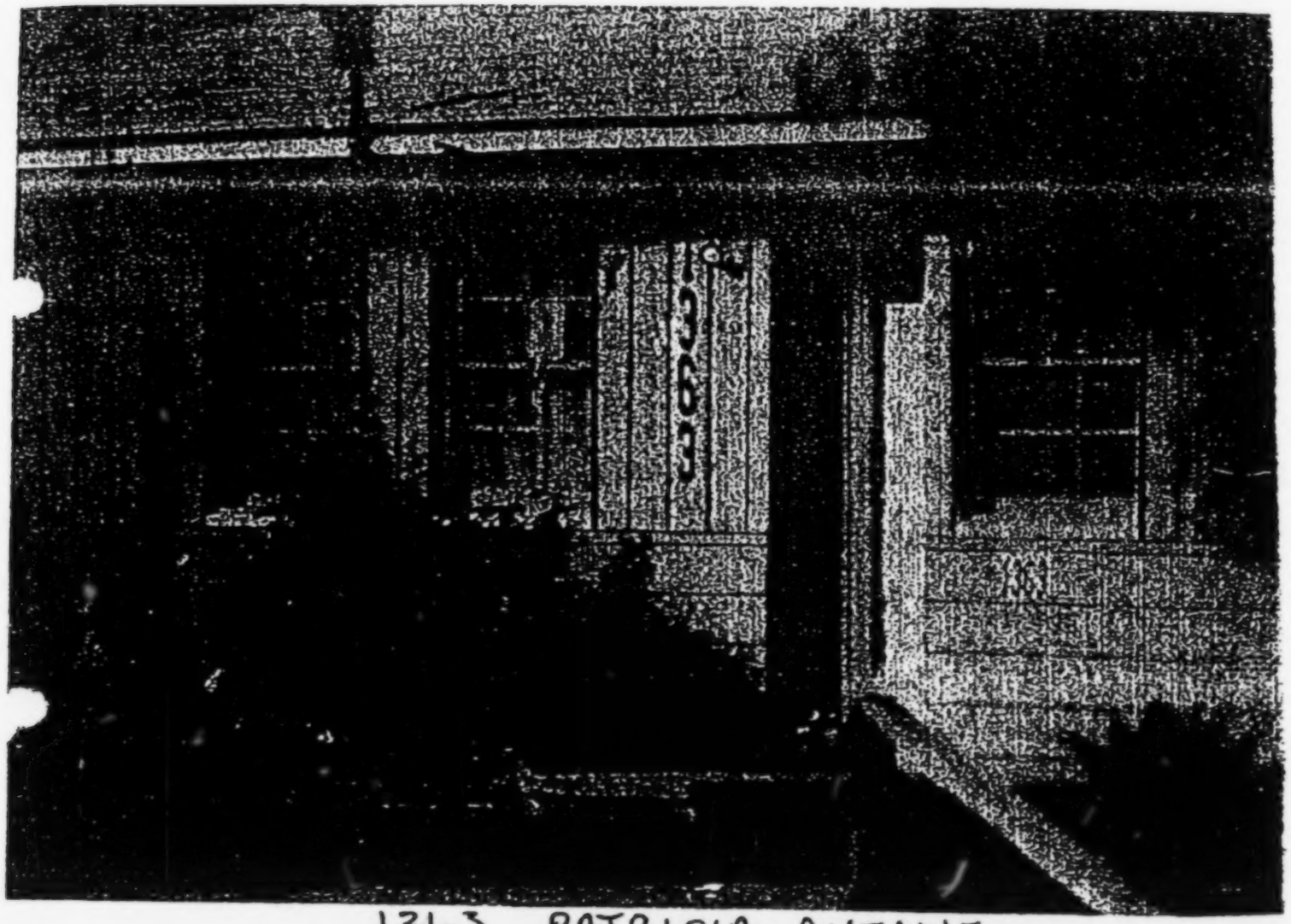
2646 HOUSE PHOTO FOLD IN'S



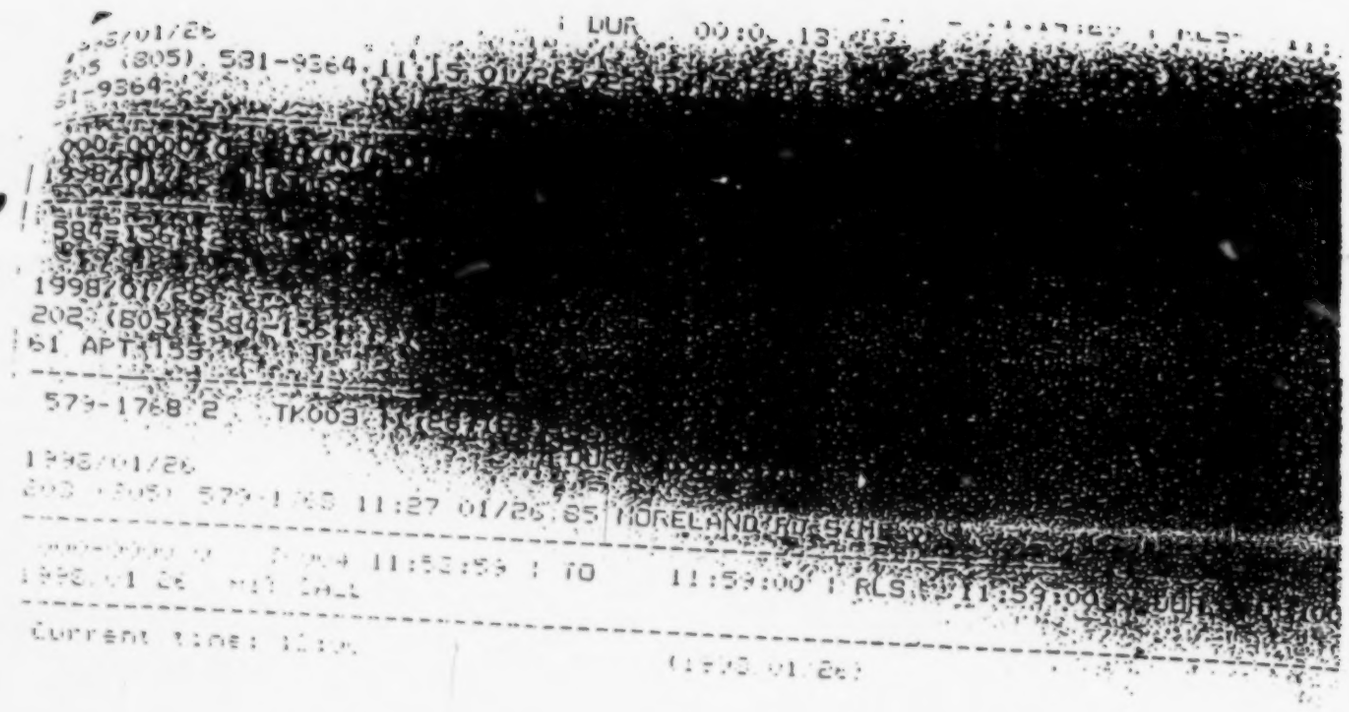
2646 CIMMARON AVENUE
SIMI VALLEY, CALIFORNIA

0 123 265

1363 PATRICIA AVE. HOUSE PHOTO



1363 PATRICIA AVENUE
SIMI VALLEY, CALIFORNIA



1998/01/26
205 (805) 522-9437 12:08 01/26 1383 PATRICIA AV SIMI VLY CA 208 RESD GONCALES
NARO 522-9437 PE#1:

ATTACHMENT C

Illeg. ble
Page

125
267

ATTACHMENT C

225

BEST AVAILABLE COPY

GANG VALIDATION
STANDARDIZED GANG IDENTIFICATION CRITERIA
SIMI VALLEY POLICE DEPARTMENT

[SEAL]

GANG NAME: WEST SIDE LOCOS

NAME: ROMERO, RAYMOND JOSEPH

DATE OF BIRTH: 6-10-79

CLASSIFICATION:

☒ HARDCORE GANG MEMBER: Must meet at least five of the first eleven criteria.

☐ ASSOCIATE GANG MEMBER: Must meet at least two of the fifteen criteria.

CHECK ALL THAT APPLY:

☒ 1. TATTOOS DEPICTING GANG INFORMATION.

☒ 2. MODE OF DRESS CONSISTENT WITH GANGS.

☐ 3. GANG GRAFFITI ON PERSONAL PROPERTY

☐ 4. POSSESSION OF WRITINGS ATTRIBUTABLE TO A PARTICULAR GANG WHICH MAY INDICATE GANG MEMBERSHIP.

☒ 5. ADMISSIONS WHICH INDICATE GANG AFFILIATION.

☒ 6. ARREST ARISING FROM A CRIMINAL ACT IN WHICH KNOWN GANG MEMBERS PARTICIPATED.

☐ 7. ATTENDANCE AT FUNCTIONS SPONSORED BY THE GANG OR BY KNOWN GANG MEMBERS.

☐ 8. INFORMATION FROM A RELIABLE INFORMANT.

☐ 9. STATEMENTS FROM FAMILY MEMBERS INDICATING THEIR BELIEF THAT THE INDIVIDUAL IS A GANG MEMBER.

☐ 10. INFORMATION FROM OTHER LAW ENFORCEMENT AGENCIES GANG OFFICERS IDENTIFYING THE SUBJECT AS A GANG MEMBER.

☒ 11. METHOD OF OPERATION CONSISTENT WITH GANG ACTIVITY (i.e. MOTEL/HOTEL PROFILE, GRAFFITI, CRIMINAL ACTIVITY).

☒ 12. FIELD INTERVIEW WITH ANOTHER GANG MEMBER.

☒ 13. OBSERVED LOITERING, RIOTING OR MEETING WITH ANOTHER GANG MEMBER.

☐ 14. INVOLVED IN THE SALES AND DISTRIBUTION OF NARCOTICS FOR A GANG MEMBER.

☐ 15. INDIRECTLY ASSOCIATED IN A CRIMINAL ACTIVITY COMMITTED BY A GANG MEMBER (LOOKOUT, RUNNER, ETC)

/s/ R. Brill #322 — 1-14-98
OFFICER (Name and serial number) — DATE

UTILITY REPORT SIMI VALLEY POLICE DEPARTMENT
NCIC/CII CA 05609 3200 COCHRAN STREET 583-6950

PAGE 1 OF 2 — 1 GRID — 2 BEAT — 3 CASE NUMBER 98-01076

4 [ ] INCIDENT REPORT
[X] SUPPLEMENTAL REPORT
[ ] CASE CLEARED

5 CONTINUATION OF:
[ ] CRIME REPORT
[ ] ARREST REPORT
[ ] INCIDENT REPORT
[ ] SUPPLEMENTAL REPORT
[ ] WORTHLESS DOCUMENT
[ ] MISSING PERSON

6 DATE/TIME OF INCIDENT:

7 LOCATION OF INCIDENT: 2246 Cimmaron Avenue

8 CODE	9 NAME (Last, First, Middle, Gen) / FIRM NAME
[S]	Romero, Raymond Joseph

10 RACE	11 SEX	12 HT	13 WT	14 BUILD	15 HAIR
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

16 EYES	17 DOB	18 AGE
[ ]	[ ]	[ ]

19 RESIDENCE ADDRESS	CITY	STATE	ZIP
1363 Patricia Avenue	Simi Valley	CA	93063

20 RESIDENCE PHONE

21 INCIDENT / OFFENSE
246.6 PC/182 PC

22 NARRATIVE: (INCLUDE ACTIONS AND CONVERSATIONS BY SUSPECTS AND VICTIMS AND OTHER EVENTS NOT PREVIOUSLY COVERED)

On 01/29/98, a search warrant was obtained for 2646 Cimmaron Avenue and 1363 Patricia Avenue, both in the City of Simi Valley. On 02/03/98, the search warrant was served at both locations, with evidence recovered and booked into SVPD evidence. Numerous items of gang paraphernalia and gang clothing was obtained from both locations, including .25 caliber bullets which were located in Raymond Romero's bedroom at 1363 Patricia Avenue. In addition to photographs depicting gang members, a yearbook (item #113) belonging to Raymond Romero was located in his bedroom at 2646 Cimmaron Avenue. Upon viewing the yearbook, I ob-

served that Raymond Romero had written the gang moniker above the individual yearbook photo of individuals belonging to the West Side Locos gang. I also observed that Raymond Romero had crossed out the photo of members of the rival Varrio Simi Valley gang and written less than complimentary remarks above the VSV member's yearbook photographs. Raymond Romero had crossed out VSV gang member, Gabriel Reyes' photograph and written "187", which is the California Penal Code section for murder.

On 02/03/98, at approx. 1600 hours, Raymond Romero responded to SVPD to retrieve two concert tickets which were in his personal property. Myself and Officer R. Brill met Raymond Romero in the lobby of SVPD and asked to speak with him. He agreed, and followed us to the Detective interview room. I explained to Raymond that we had located an open box of .25 caliber ammunition in his bedroom at 1363 Patricia Avenue. I asked him where we could locate the .25 handgun. He at first denied ever having a .25 caliber handgun; then admitted to having a .25 caliber handgun on the day of the drive-by shooting, 01/13/98. He stated he had attempted to fire the handgun to ascertain if the handgun would fire; however, the gun "didn't work". He stated he "got rid of this handgun" and they (himself, Delfino Vasquez, and Ricardo Bravo) retrieved a second handgun. Raymond made no comments as to the actual drive-by shooting.

We asked him where he had purchased the .25 caliber handgun, and he said, "From some guy named 'Tim' 'Rancho Simi Park' for $100.00". He said he returned the handgun to "Tim" after the gun would not fire, and "Tim" refunded Raymond's $100.00. "Tim" is obviously a fictitious name/person, and it is unknown where the .25 caliber handgun can be located. We asked him how he contacted "Tim" and what was the subjects last name. Raymond Romero said, "I just see him around the park, but I don't know his last name or where he works".

The "Return To Search Warrant" was signed and filed on 02/06/98. See the attached paperwork listing the items recovered from the search warrant and booked into SVPD evidence.

23 NUMBER OF ARRESTEES:

24 ASSIGNED TO:

25 ASSIGNED BY:

26 CASE DISPO CLOSED BY
[ ] INACTIVE [ ] UNFOUNDED
[ ] ARR & PROS
[ ] COMP REFUSES TO PROS
[ ] COMP REFUSED BY DA
[ ] PROS OTHER OFFENSE
[ ] OCCURRED OTHER JURISDICTION
[ ] TURNED OVER TO OTHER JURISDICTION
[ ] DEATH OF SUSPECT
[ ] OTHER _____

27 COPIES TO:
[X] DET [X] CAU [ ] NARC [ ] PROB
2[X] JUV [ ] CII [X] OFFICER
[ ] WATCH COMMANDER ____
[X] OTHER DET. [ILLEGIBLE]

28 DATE/TIME REPORTED
01/13/98 2031

29 DATE/TIME OF REPORT
02/06/98 1600 hours

30 REPORTING OFFICER / ID NO/DIV/UNIT
D. Muehler #248/SPS/GI

31 APPROVED BY / ID NO
/s/ [ILLEGIBLE] [ILLEGIBLE] 6

UTILITY EPORT SIMI VALLEY POLICE DEPARTMENT
NCIC/CII CA 05609 3200 COCHRAN STREET 583-6950

PAGE 2 OF 2 | 1 GRID | 2 BEAT | 3 CASE NUMBER 98-01076

4 [ ] INCIDENT REPORT
[X] SUPPLEMENTAL REPORT
[ ] CASE CLEARED

5 CONTINUATION OF: [ ] CRIME REPORT
[ ] ARREST REPORT
[ ] INCIDENT REPORT
[ ] SUPPLEMENTAL REPORT
[ ] WORTHLESS DOCUMENT
[ ] MISSING PERSON

6 DATE/TIME OF INCIDENT: 01/13/98 2031 hrs.

7 LOCATION OF INCIDENT: 355 E. Bonita

8 CODE	9 NAME (Last, First, Middle, Gen) / FIRM NAME
[S]	Romero, Raymond Joseph

10 RACE	11 SEX	12 HT	13 WT	14 BUILD	15 HAIR
[ ]	[ ]	[ ]	[ ]	[ ]	[ ]

16 EYES	17 DOB	18 AGE
[ ]	[ ]	[ ]

19 RESIDENCE ADDRESS	CITY	STATE	ZIP
1363 Patricia Avenue	Simi Valley	CA	93063

20 RESIDENCE PHONE: 522-9437

21 INCIDENT / OFFENSE: 246.6 PC/182 PC 245(a)(2) P.C.

22 NARRATIVE: (INCLUDE ACTIONS AND CONVERSATIONS BY SUSPECTS AND VICTIMS AND OTHER EVENTS NOT PREVIOUSLY COVERED)

Patricia Romero stated she was not surprised by this recent event involving Raymond. She said, "I know, Ray is either going to be dead or in prison." She said that she would not mind, if in the furture, we needed to come back to her residence regarding her son, Raymond.

Both interviews were covertly tape recorded and the micro-cassette tape was booked into SVPD evidence.

23 NUMBER OF ARRESTEES:

24 ASSIGNED TO:

25 ASSIGNED BY:

26 CASE DISPO CLOSED BY
[ ] INACTIVE [ ] UNFOUNDED
[ ] ARR & PROS
[ ] COMP REFUSES TO PROS
[ ] COMP REFUSED BY DA
[ ] PROS OTHER OFFENSE
[ ] OCCURRED OTHER JURISDICTION
[ ] TURNED OVER TO OTHER JURISDICTION
[ ] DEATH OF SUSPECT
[ ] OTHER _____

27 COPIES TO: [ ] DET [ ] CAU [ ] NARC [ ] PROB
[ ] JUV [ ] CII [ ] OFFICER
[ ] WATCH COMMANDER ____
[ ] OTHER _____

28 DATE/TIME REPORTED		29 DATE/TIME OF REPORT	
01/13/98	2031	01/26/98	1200 hours

30 REPORTING OFFICER / ID NO/DIV/UNIT
D. Muehler #248/SPS/GI

31 APPROVED BY / ID NO
-/s/ [ILLEGIBLE] [ILLEGIBLE]

SIMI VALLEY POLICE DEPARTMENT POLICY AND PROCEDURES MANUAL Special Operations Unit	SUBJECT: SERVICE OF SEARCH WARRANTS AND RAIDS	NUMBER: UNIT NUMBER 206
	DATE: 10/26/94 PAGE 1 OF 2	SUPERCEDES: UNIT ORDER 311 DATED 09/15/93

I. POLICY

A. It is the policy of the Special Operations Unit that the execution of search warrants, arrests, conducting parole searches, or invoking search clauses as a condition of parole shall be accomplished with the safety of the involved personnel as the prime consideration.

II. PROCEDURE

A. Supervisor

1. No search shall be executed on any type of building nor will a "buy bust" take place without the presence of a supervisor.

B. Background Information

1. Prior to conducting a search or planned arrest, the assigned detective/officer will prepare a file containing background information concerning the suspects involved and the location to be entered.
2. Suspect(s) Information
   a. Rap sheet
   b. Photographs
   c. D.M.V. information
   d. Reports
   e. Information on known associates
   f. Vehicle(s)
   g. Any other information available

3. Location
   a. Description of the location of the premises or area involved
   b. Description of the interior and exterior of the building.
      (1) Diagram of the structure whenever possible.
   c. Number of expected persons on the premises.
      (1) Background information on occupants (in addition to the primary suspect[s]).
      (2) Presence of any children.
   d. Any threats to officers.
   e. Firearms expected to be on the premises.
      (1) Include type, location, etc.
   f. Amount and location of any expected contraband.
   g. Dogs at the premises.
   h. Suspect's plans in the event of a raid.
   i. The presence of any specialized electronic equipment.
   j. Any other pertinent data.

C. Operational Plan

1. Prior to the execution of any search or planned arrest, a written Operational Plan will be developed and approved by the unit supervisor. Long and short form samples are attached.
2. The Operational Plan shall include:
   a. Necessary background information on the suspect(s) and location involved.

b. Photograph of the suspect(s) and of any informant(s) or undercover officer(s) involved (if not present at the briefing).

c. Diagram of the location involved (interior and exterior).

d. Location of any "staging area" or command post to be used prior to the execution of the raid.

e. Directions to the suspect location and to the "staging area."

f. Specific assignments of all personnel involved in the raid.

g. Assignment of specialized equipment.

h. Assignment of radio frequency to be used.

i. Copy of appropriate street map for the location which also depicts route to nearest medical facility.

3. Personnel assignments

a. A minimum of six (6) officers, including at least one (1) uniformed officer, should comprise a raid team for the purpose of the execution of a building entry.

b. Building entry

(1) Entry team

(a) One uniformed officer and a minimum of two detectives

(2) Rear yard

(a) Two personnel

(3) Side yards and other exits

(a) Whenever possible, side yards and other exits from the premises which are not readily observable by the entry team or the rear yard team should be covered.

c. Containment and search team.

(1) A containment team of a minimum of two personnel should be assigned to contain all occupants of the premises.

(2) A search team of a minimum of two officers should be assigned to conduct any specified searches and to collect and record any evidence and/or contraband seized.

(3) One detective or crime scene investigator shall be assigned to photograph (or video-tape) the operation.

(a) The premises, including any damage done by the entry team prior to searching

(b) The occupants of the premises

(c) All evidence and contraband seized

(d) If appropriate, post search photographs

d. Prisoner processing team

(1) The on scene supervisor shall facilitate the transportation and booking of any suspects arrested at the scene.

(2) All persons within the premises shall be contained until the premises is secure. They will then be patted down for weapons and contraband, identified, F.I.'d and run for outstanding warrants.

(3) When the interior of the premises is secured, officers shall notify those personnel outside.

(4) In the event of "shots fired," officers should contain the premises and call for assistance.

(5) Should an accidental discharge occur, the involved officer shall immediately appraise those present what occurred and check for injuries.

(6) Members involved in conducting a raid shall use only that force necessary while effecting an arrest. Physical force will be used only in the following circumstances:

(a) To prevent escape

(b) To prevent destruction of evidence

(c) In self defense

(d) To prevent violence to another person

G. Evidence

1. Special Operations Unit personnel shall only seize those items of evidentiary value, items which cannot be legally seized will not be confiscated.
2. All evidence seized will be properly marked and tagged and shall remain in the possession of the designated finder until secured in the evidence locker or crime lab.
3. All evidence seized will be recorded. A copy of the seized property sheet and a copy of the search warrant shall be left with the occupant or left in a conspicuous place where it can be found by the occupant.

4. No property or evidence will be removed from the searched premises unless it is listed on the search warrant or is of explicit evidentiary value.
5. No property will be willfully or maliciously damaged or destroyed by any officer while executing a search warrant.
6. The search warrant return should be properly filed with the court of jurisdiction within three (3) working days from the date of the execution of the search warrant. The maximum life of a search warrant is ten (10) days.

H. General Guidelines

1. In the event of a mistaken arrest of the entry into the wrong premises, or alleged misconduct, the unit supervisor or case detective on the scene will report the circumstances of such incident to the unit commander, who will immediately notify the Division Captain. Written reports detailing the circumstances of the incident will be submitted within 24 hours to the unit commander.
2. On occasion, it may be necessary to secure a building prior to the receipt of a search warrant. In such instances, the structure will be secured and occupants controlled after which Special Operations Unit personnel will vacate the structure to await arrival of the warrant. Exception—when occupants are not removed from the premises, a necessary number of police personnel will remain with the occupant(s) for security purposes.
3. At no time will police personnel consume any food or beverage upon any premises which is being searched, has been searched, or is about to be searched.

4. Unless approved by the unit commander in advance, non-enforcement personnel will not be allowed to accompany officers during any planned search or arrest activity.

Cross References:

General Order #0020
General Order #0401
General Order #1001

Approved/Adopted: /s/ RW Wright Date 2-16-95
Division Captain

Simi Valley Police Department
Special Operations Unit
Tactical Operation Plan

TYPE OF OPERATION

DR/Case # 98-01076

☐ Arrest ☒ Search ☐ Buy/Bust ☐ Surveillance
☐ Buy/Ride ☐ Stakeout ☐ Other: _____

Case Detective: Muehler Phone: _____ Pager: [redacted] Cellular: [redacted]

Other Agencies: US Border Patrol

OPERATION SCHEDULE

Briefing Date: 02/03/98 Time: 0600 Hrs. Location: _____

Operation begins at: 0700 Hrs.Both locations simutaneously

Staging Location: West Parking lot/Simi South, Heywood West of Erringer

Route to staging location: S/B Sycamore to W/B Heywood St.**Team #1 will stage from SVPD

COMMUNICATIONS

Primary Radio Channel: SVPD Channel #3/Loc 2 Frequency: _____ MHZ

Alternate Radio Channel: SVPD Channel #6/Loc 1 Frequency: _____ MHZ

"Wire" Frequency: ☐ SVPD Wire 1 (Channel 22) ☐ SVPD Wire 2 (Channel 23)
☐ Other: _____

MISSION/OBJECTIVE

Serve search warrant at two locations. Which are directly linked to S-Raymond Romero. Primary objective is to recover a .25 caliber, semi-auto handgun, silver

OPERATION LOCATION

Location: Location #1: 2646 Cimmaron Avenue Phone 581-0547

Location #2: 1363 Patricia Avenue Phone # 522-9437

Thomas Map Information: Loc. #1: Pg. 498 C-1 ☒ Check if diagram attached
Loc. #2: Pg. 497 J 3

8

SIMI VALLEY POLICE DEPARTMENT
Special Operations Unit

SUSPECT INFORMATION

1. Name: Raymond Joseph Romero

Race H Sex M HT 5'7" WT 155 lbs. Hair Brn Eyes Brn

Address: 1363 Patricia Avenue, Simi Valley Phone #: 522-9437

Other Identifying Information: Tattoos: "Locos 13" on stomach, "Westside Locos" on forearm

Believed Armed? [x] Yes [ ] No - Type: .25 cal., semi-auto. handgun.

Violent History? [x] Yes [ ] No: _____

Arrestable? [ ] Yes [x] No - Charge(s): _____

Other Information: Westside Locos gang member

Moniker: "El Gato"

Vehicle #1: None registered

Vehicle #2: _____

2. Name: _____

Race _____ Sex _____ HT _____ WT _____ Hair _____ Eyes _____

Address: _____ Phone #: _____

Other Identifying Information: _____

Believed Armed? [ ] Yes [ ] No - Type: _____

Violent History? [ ] Yes [ ] No: _____

Arrestable? [ ] Yes [ ] No - Charge(s): _____

Other Information: _____

_____

Vehicle #1: _____

Vehicle #2: _____

3. Name: _____

Race _____ Sex _____ HT _____ WT _____ Hair _____ Eyes _____

Address: _____ Phone #: _____

Other Identifying Information: _____

Believed Armed? [ ] Yes [ ] No - Type: _____

Violent History? [ ] Yes [ ] No: _____

Arrestable? [ ] Yes [ ] No - Charge(s): _____

Other Information: _____

_____

Vehicle #1: _____

Vehicle #2: _____

[ ] Check if additional suspects - see attachment.

9

PERSONNEL

NAME	CALL SIGN	CELLULAR	PAGER	ASSIGNMENT
Lt. Thomas	F10 ✓	[redacted]	[redacted]	O.I.C.
D.Muehler	G1 ✓	[redacted]	[redacted]	Case Detective
Sgt. Riegert	G20	[redacted]	[redacted]	Team Leader/Location #1
J.May	G2	[redacted]	[redacted]	Search Team #1/Evidence Colle
A.Giuliani	G4		[redacted]	Search Team #1
P.FITZPATRICK	X			UNIFORM
R.Brill	G3 ✓		[redacted]	Search Team #2/Evidence Colle
M.Hodges	F1 ✓	[redacted]	[redacted]	Search Team #2/Garage
J.Adamczyk	F2 ✓		[redacted]	Search Team #2/Garage
B.Daniels				Search Team #2/Motorhome
S.Greenwood				Search Team #2/Motorhome
B.Summey				Search Team #2/Camper
A.Mccord	✓			Search Team #2/Camper
K.Shatz				Search Team #2/Van/Trucks
J.Carrott				Search Team #2/Van/Trucks
R.CHAMBERS	— ✓			Search Team #2/
T.Brown	G9 ✓			Search Team #2/
S.Johnson	K1			Search Team #2/Containment/Re
V.Allegra	X ✓			Search Team #2/Containment/Tr
M.Brill	X323			Search Team #2/Containment/Tr

☐ Check if more personnel - see attachment

☒ Check if SWAT assigned - see SWAT Operational Plan

U/C #1 Description: N/A

Clothing: N/A

Vehicle: N/A

U/C #2 Description: N/A

Clothing: N/A

Vehicle: N/A

10

ANTICIPATED SEQUENCE OF EVENTS

Sgt. Riegert/Team #1 will respond to 2646 Cimmaron. While Team #2 responds to 1363 Patricia Avenue. Upon the arrival of both teams at the locations, and upon containement being in place at location #2, Officer Muehler will give the command for both teams to execute.

Arrest Signals: Verbal N/A

Visual N/A

"Panic" Signals: Verbal

Visual

Officer with "Knock and Notice" responsibility (if applicable) 2646 Cimmaron Avnue/Sgt. Riegert ~~1363 Patricia Ave./Det. Lappin(Interior of Res)/Officer R.Brill(Attached garage), Individual Officers/Dets.~~ at any outbuildings

PLAN IF OFFICER OR U/C INJURED

1. Rescue/transportation assignment: Ventura County Fire Department ~~will stage at Location #2~~
2. Cover/backup assignment: Officer Muehler
3. Notify: Officer Muehler/ In the event that any Officer is injured
4. Other Information: all searching officers will be advised to HOLD their positions until injured personnel are removed.

Closest Hospital: Simi Valley Hospital

Address: 2975 Sycamore Dr., Simi Valley

Phone: 527-2727

Route to hospital: E/B Parricia to N/B Erringer Rd. to E/B Alamo to N/B Sycamore Dr

OUTSIDE AGENCY NOTIFICATIONS

1. Agency: Ventura County Fire #45 Phone: 578-2088
   Person Notified: CAPT VANDENBOSSCHE By: R. BRILL Time: 0600
2. Agency: ~~AMR Ambulance~~ Phone: 527-1133
   Person Notified: CAPT By: R. BRILL Time: 0600
3. Agency: Phone:
   Person Notified: By: Time:

Attachments: ☒ Diagram/Sketch ☐ Additional Suspects ☐ Additional Officers
☒ SWAT Plan ☐ Other:

11

DIAGRAM TWO
1363 PATRICIA AVENUE (INTERIOR)

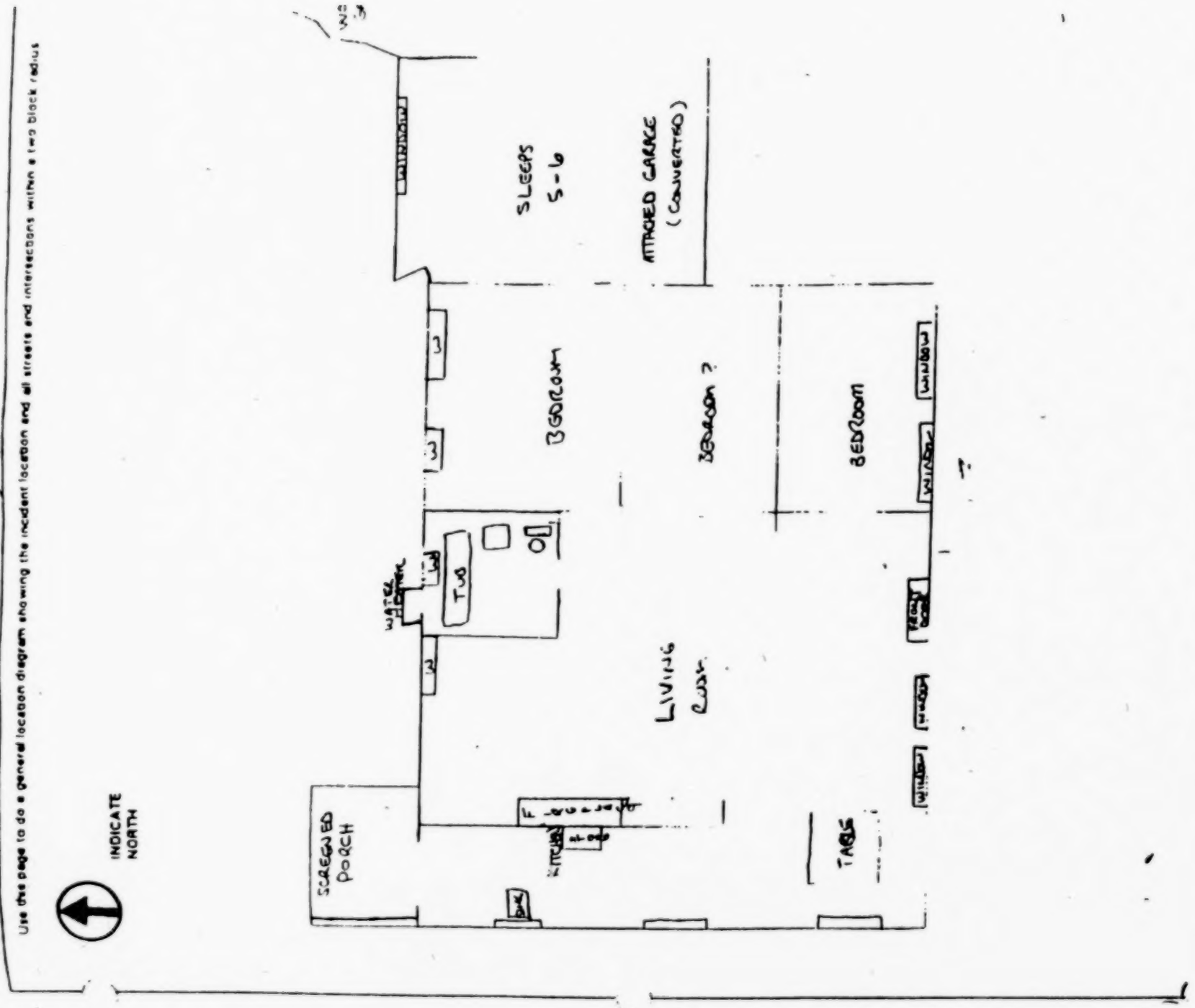


DIAGRAM THREE
1363 PATRICIA AVENUE

DIAGRAM THREE

1363 PATRICIA AVENUE

Use this page to do a detailed diagram of the specific location

INDICATE NORTH

1363 PATRICIA

STEVENS K-9

DIRT DRIVEWAY

WOOD GATE

ADAMCZYK M. HUGGS R. GRILL

GARAGE

MUELLER CHAMBERS

24

REAR YARD OF 1363

SHED

CHEVY

DANIELS GREENWOOD

TRUCK

MOTORHOME

MCCORD SUMMEY

BOAT

VAN

SHARP CARROTT

RESIDENCE (UNOCCUPIED)

ABAIL ALLEGRA

Location of Identical Floorplan: _____

CONFIDENTIAL - RETURN ALL COPIES TO TEAM LEADER

SIMI VALLEY POLICE DEPARTMENT - CITY OF SIMI VALLEY

NOTICE TO APPEAR

SV 110766

☐ TRAFFIC ☒ MISDEMEANOR ☐ NONTRAFFIC ☐ BOOKING REQ. ☐ PROBATION

DATE	TIME	DAY OF WK	CASE NO
FEB 3 1998	0830 ☒ AM ☐ PM	TUE	98-03022

NAME (FIRST, MIDDLE, LAST): RAYMOND JOSEPH ROMERO

ADDRESS: 1363 PATRICIA APT. NO.

CITY	STATE	ZIP	TELEPHONE NO.
SIMI VALLEY	CA	93065	522-9437

DRIVER'S LICENSE NO.	STATE	CLASS	BIRTHDATE
			6.10.79

RACE	SEX	HAIR	EYES	HEIGHT	WEIGHT	AGE
H	M	BLK	BRN	5.9	160	18

VEHICLE LICENSE NO.	STATE	REG EXP.	PASS M / F	☐ C.V. (VC 152.108) ☐ H.M. (VC 353)

VEH. YR	MAKE	MODEL	BODY STYLE	COLOR

REGISTERED OWNER OR LESSEE ☐ SAME AS ABOVE

ADDRESS OF OWNER OR LESSEE ☐ SAME AS ABOVE

EVIDENCE OF FINANCIAL RESPONSIBILITY ☐ YES ☐ NO

COMPANY: POLICY NO.

(VC 40610) ELIGIBLE FOR DISMISSAL: (SEE REVERSE)

VIOLATION(S)

Y	N	
☐	☐	11357(b) H&S - POSSESSION OF LESS
☐	☐	THAN 1 OZ. MARIJUANA
☐	☐	
☐	☐	
☐	☐	

SPEED: APPROX.	PSP MAX	VEH. LMT.	SAFE	RADAR: ☐ STAT ☐ MOV	GRID	VEH NO.	N / W / E / S

LOCATION OF VIOLATION(S): 2646 CIMMARON SIMI VALLEY

WEATHER: CLEAR	RAIN	FOG	SURFACE: DRY	WET	TRAFFIC: LIGHT	MEDIUM	HEAVY	LIGHT: DAWN	DAY	DUSK	NIGHT

☐ OFFENSE(S) NOT COMMITTED IN MY PRESENCE. DECLARED ON INFORMATION & BELIEF I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE & CORRECT.

DATE 2.3.98 ISSUING OFFICER GIULIANI I.D. NO. 321

NAME OF ARREST OFFICER (OR CITIZEN) IF DIFFERENT THAN ABOVE — OFFICER UNAVAILABLE

WITHOUT ADMITTING GUILT, I PROMISE TO APPEAR AT THE TIME & PLACE INDICATED

SIGNATURE Raymond Romero

APPEARANCE DATE AND TIME: MARCH 3 1998 TIME 8:15 ☒ AM ☐ PM

X	VENTURA COUNTY MUNICIPAL COURT, SIMI VALLEY DEPARTMENT 3855-F ALAMO ST., SIMI VALLEY, CALIFORNIA 93063
	JUVENILE TRAFFIC COURT, SIMI VALLEY DEPARTMENT 3855-F ALAMO ST., SIMI VALLEY, CALIFORNIA 93063 (WITH PARENT/GUARDIAN)
	VENTURA COUNTY MUNICIPAL COURT HALL OF JUSTICE, 800 S. VICTORIA AVE., VENTURA, CALIFORNIA 93009
	TO BE NOTIFIED BY MAIL

SV110766

FORM APPROVED BY THE JUDICIAL COUNCIL OF CALIFORNIA
REV. 10-25-96 V.C. 40500, 40513(b), 40522 P.C. 853.6a.

COURT COPY

0830
0915

TERRAMAR GRAPHICS (805) 531-0375 840797

-3 mo. on PATRICIA
Been Warnings

SIMI VALLEY POLICE DEPARTMENT
NOTICE TO APPEAR

18

SIMI VALLEY POLICE DEPARTMENT

CIC/CII CA 05609 PAGE 1 of 3

1 CASE NUMBER: 98-3016
2 SEARCH WARRANT NO:

INVENTORY OF PROPERTY TAKEN ON SEARCH WARRANT (PENAL CODE 1537)

4 DATE/TIME: 2-3-98/0845 | 5 GRID | 6 BEAT

7 ITEM NO	8 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	9 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
1	ROMERO, RAYMUND	1363 PATRICIA

10 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: NOTEBOOKS CONTAINING MISC GANG WRITINGS RECOVERED FROM FLOOR NEAR PHONE IN P.R. BEDROOM

11 STORAGE LOCATION:

12 EVIDENCE/WORK REQUESTED:

13 OFFICER LOCATING PROPERTY/ID NO	14 PHOTO	15 OFFICER SEIZING PROPERTY/ID NO	16 OFFICER BOOKING PROPERTY
M. HODGES 309	☐ Yes ■ No	R. BRILL 322	R. BRILL 322

17 ITEM NO	18 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	19 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
2	ROMERO, RAYMOND	1363 PATRICIA

20 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: NEWSPAPER ARTICLES REGARDING DRIVE BY SHOOTING. RECOVERED FROM TOP OF TV IN P.R. ROOM

21 STORAGE LOCATION:

22 EVIDENCE/WORK REQUESTED:

23 OFFICER LOCATING PROPERTY/ID NO	24 PHOTO	25 OFFICER SEIZING PROPERTY/ID NO	26 OFFICER BOOKING PROPERTY
M. HODGES 309	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

27 ITEM NO	28 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	29 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
3	ROMERO, RAYMOND	1363 PATRICIA

30 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: WALLET CONTAINS I.D OF RAYMUND ROMERO RECOVERED FROM TV STAND DRAWER IN P.R. ROOM CONTAINS $140.00

31 STORAGE LOCATION:

32 EVIDENCE/WORK REQUESTED:

33 OFFICER LOCATING PROPERTY/ID NO	34 PHOTO	35 OFFICER SEIZING PROPERTY/ID NO	36 OFFICER BOOKING PROPERTY
N. HODGES 309	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

37 ITEM NO	38 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	39 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
4	ROMERO, RAYMOND	1363 PATRICIA

40 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: (25) .25 AUTO BULLETS CONTAINED IN BOX BRAND: WINCHESTER. RECOVERED FROM BOTTOM SHELF IN CLOSET OF P.R. ROOM.

41 STORAGE LOCATION:

42 EVIDENCE/WORK REQUESTED:

43 OFFICER LOCATING PROPERTY/ID NO	44 PHOTO	45 OFFICER SEIZING PROPERTY/ID NO	46 OFFICER BOOKING PROPERTY
M. HODGES 309	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

47 ITEM NO	48 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	49 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
5	ROMERO, RAYMOND	1363 PATRICIA

50 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: (2.) GANG T-SHIRTS RECOVERED FROM CLOSET OF P.R. ROOM

51 STORAGE LOCATION:

52 EVIDENCE/WORK REQUESTED:

53 OFFICER LOCATING PROPERTY/ID NO.	54 PHOTO	55 OFFICER SEIZING PROPERTY/ID NO	56 OFFICER BOOKING PROPERTY
M. HODGES 309	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

57 ITEM NO	58 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	59 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
6	ROMERO, RAYMOND	1363 PATRICIA

60 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: BASEBALL BAT CONTAINS GANG WRITING RECOVERED FROM CLOSET IN P.R. ROOM

61 STORAGE LOCATION:

62 EVIDENCE/WORK REQUESTED:

63 OFFICER LOCATING PROPERTY/ID NO	64 PHOTO	65 OFFICER SEIZING PROPERTY/ID NO	66 OFFICER BOOKING PROPERTY
M. HODGES 309	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

I R. BRILL 322 2-3-98/0820

The above is a detailed list of all property taken by me under authority of a search warrant issued the 29 day of JANUARY, 1998, in the Ventura County MUNICIPAL Court.

Officer's Signature R. BRILL 19

SIMI VALLEY POLICE DEPARTMENT

SIMI VALLEY POLICE DEPARTMENT

1 CASE NUMBER: 98-3016

2 SEARCH WARRANT NO:

CIC/CII CA 05609

PAGE 2 of 3

INVENTORY OF PROPERTY TAKEN ON SEARCH WARRANT (PENAL CODE 1537)

4 DATE/TIME: 2-3-98 / 0845

5 GRID:

6 BEAT:

7 ITEM NO	8 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	9 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
7	ROMERO, RAYMUND	1363 PATRICIA

10 PROPERTY Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc: AMERICAN ME VIDEO TAPE FROM VCR ON TV. IN P.R. ROOM

11 STORAGE LOCATION:

12 EVIDENCE/WORK REQUESTED:

13 OFFICER LOCATING PROPERTY/ID NO	14 PHOTO	15 OFFICER SEIZING PHOPERTY/ID NO	16 OFFICER BOOKING PROPERTY
R. BRILL 322	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

17 ITEM NO	18 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	19 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
8	ROMERO, RAYMUND	1363 PATRICIA

20 PROPERTY Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc: TELEPHONE CONTAINS GANG WRITING RECOVERED FROM P.R. ROOM

21 STORAGE LOCATION:

22 EVIDENCE/WORK REQUESTED:

23 OFFICER LOCATING PROPERTY/ID NO	24 PHOTO	25 OFFICER SEIZING PROPERTY/ID NO	26 OFFICER BOOKING PROPERTY
R. BRILL 322	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

27 ITEM NO	28 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	29 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
9	ROMERO, RAYMOND	1363 PATRICIA

30 PROPERTY Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc: (1) BLOW GUN RECOVERED FROM PINK ROOM

31 STORAGE LOCATION:

32 EVIDENCE/WORK REQUESTED:

33 OFFICER LOCATING PROPERTY/ID NO	34 PHOTO	35 OFFICER SEIZING PROPERTY/ID NO	36 OFFICER BOOKING PROPERTY
M. HUGG 322	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

37 ITEM NO	38 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	39 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
10	MARCO CARDON	1363 PATRICIA

40 PROPERTY Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc: (1) .22 CAL SEMI-AUTO HANDGUN SER# AE71630 BRAND: IVER JOHNSON W/MAGAZINE SER# CP5525. W.11 MISC ID. FROM DESK DRAWER IN PORCH ROOM W/CASE

41 STORAGE LOCATION:

42 EVIDENCE/WORK REQUESTED:

43 OFFICER LOCATING PROPERTY/ID NO	44 PHOTO	45 OFFICER SEIZING PROPERTY/ID NO	46 OFFICER BOOKING PROPERTY
R. JONES 305	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

47 ITEM NO	48 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	49 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
11	MARCO CARDON	1363 PATRICIA

50 PROPERTY Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc: .22 CALIBER ROUNDS OF AMMUNITION RECOVERED FROM PORCH ROOM

51 STORAGE LOCATION:

52 EVIDENCE/WORK REQUESTED:

53 OFFICER LOCATING PROPERTY/ID NO.	54 PHOTO	55 OFFICER SEIZING PROPERTY/ID NO	56 OFFICER BOOKING PROPERTY
R. JONES 305	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

57 ITEM NO	58 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	59 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
12	ROMERO, RAYMOND	1363 PATRICIA

60 PROPERTY Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc: (1) LARGE BASEBALL BAT CONTAINS GANG WRITING

61 STORAGE LOCATION:

62 EVIDENCE/WORK REQUESTED:

63 OFFICER LOCATING PROPERTY/ID NO	64 PHOTO	65 OFFICER SEIZING PROPERTY/ID NO	66 OFFICER BOOKING PROPERTY
R. JONES 305	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

R. BRILL 322 2-3-98 / 0845

The above is a detailed list of all property taken by me under authority of a search warrant issued the 29th day of JANUARY, 19 98, in the Ventura County MUNICIPAL Court.

Officer's Signature _____

SIMI VALLEY POLICE DEPARTMENT

NCIC/CII CA 05609

PAGE 3 of 3

1 CASE NUMBER: 98-3016

2 SEARCH WARRANT NO:

INVENTORY OF PROPERTY TAKEN ON SEARCH WARRANT (PENAL CODE 1537)

4 DATE/TIME: 2-3-98 / 0845

5 GRID:

6 BEAT:

7 ITEM NO	8 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	9 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
13	ROMERO RAYMUND	1363 PATRICIA

10 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: MISC FIREWORKS FOUND IN P.R. ROOM

11 STORAGE LOCATION:

12 EVIDENCE/WORK REQUESTED:

13 OFFICER LOCATING PROPERTY/ID NO	14 PHOTO	15 OFFICER SEIZING PROPERTY/ID NO	16 OFFICER BOOKING PROPERTY
R. BRILL 322	☐ Yes ☒ No	R. BRILL 322	R. BRILL 322

17 ITEM NO	18 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	19 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
14	HYNES, SHAWN	1363 PATRICIA

20 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: 2.0 - LOCK BAGGY CONTAINS MARIJUANA TOTAL WGHT: 14.6gg

21 STORAGE LOCATION:

22 EVIDENCE/WORK REQUESTED:

23 OFFICER LOCATING PROPERTY/ID NO	24 PHOTO	25 OFFICER SEIZING PROPERTY/ID NO	26 OFFICER BOOKING PROPERTY
V. ALLEGRA 320	☐ Yes ☒ No	V. ALLEGRA 320	R. BRILL 322

27 ITEM NO	28 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	29 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
15	ROMERO, RAYMOND	1363 PATRICIA

30 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: 35MM FILM DEPICTS DAMAGE TO PATRICIA HOUSE

31 STORAGE LOCATION:

32 EVIDENCE/WORK REQUESTED:

33 OFFICER LOCATING PROPERTY/ID NO	34 PHOTO	35 OFFICER SEIZING PROPERTY/ID NO	36 OFFICER BOOKING PROPERTY
MCCONNELL	☐ Yes ☒ No	MCCONNELL	R. BRILL 322

37 ITEM NO	38 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	39 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY
16	ROMERO RAYMOND	1363 PATRICIA

40 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.: VIDEO TAPE OF INTERIOR: PRE AND POST SEARCH

41 STORAGE LOCATION:

42 EVIDENCE/WORK REQUESTED:

43 OFFICER LOCATING PROPERTY/ID NO	44 PHOTO	45 OFFICER SEIZING PROPERTY/ID NO	46 OFFICER BOOKING PROPER
MCCONNELL	☐ Yes ☒ No	MCCONNELL	R. BRILL 322

47 ITEM NO	48 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	49 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY

50 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.:

51 STORAGE LOCATION:

52 EVIDENCE/WORK REQUESTED:

53 OFFICER LOCATING PROPERTY/ID NO.	54 PHOTO	55 OFFICER SEIZING PROPERTY/ID NO	56 OFFICER BOOKING PROPERTY
	☐ Yes ☐ No		

57 ITEM NO	58 PERSON PROPERTY BOOKED TO (Last Name, First, Middle, Gen)	59 LOCATION WHERE PROPERTY FOUND OR TAKEN INTO CUSTODY

60 PROPERTY: Itemized, Detailed Description of Same, Including Color, Size, Serial Number, Etc.:

61 STORAGE LOCATION:

62 EVIDENCE/WORK REQUESTED:

63 OFFICER LOCATING PROPERTY/ID NO	64 PHOTO	65 OFFICER SEIZING PROPERTY/ID NO	66 OFFICER BOOKING PROPERTY
	☐ Yes ☐ No		

R. BRILL 322 2-3-98 0845 DTH3

The above is a detailed list of all property taken by me under authority of a search warrant issued the 2-3-98 day of JANUARY, 19 98, in the Ventura County MUNICIPAL Court.

98-3016

Officer's Signature R BRILL 21

SIMI VALLEY POLICE DEPARTMENT

BEST AVAILABLE COPY

JURY NOTE NO. 5
[Filed June 21, 2001]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DATE: 6-21-01
TIME:

CASE NO. CV98-8512-AHM
CASE NAME: Iris Mena, et al v. City of Simi Valley, et al.,

THE JURY HAS REACHED A UNANIMOUS VERDICT __

THE JURY REQUESTS THE FOLLOWING:

Legal question: is the use of handcuffs equal to the use of force?

ANSWER: Yes

/s/ A. H. Matz
U.S.D.J.

/s/ Patricia Casta
Hope Corneja
FOREPERSON OF THE JURY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed June 21, 2001]

CASE NO. CV 98-8512 AHM

IRIS MENA and JOSE E. MENA,
Plaintiffs,

v.

CITY OF SIMI VALLEY, *et al.*,
Defendants.

SPECIAL VERDICT

We, the jury in the above-entitled action, based on the evidence presented and on the instructions given to us by the Court, now reach our verdict on the issues submitted to us.

QUESTION NO. 1:

(a) Do you find that defendant William Lappin violated the rights of plaintiffs under the Fourth Amendment to the United States Constitution to be free from unreasonable search by failing to properly knock and announce the presence of the officers at 1363 Patricia Avenue and by unnecessarily destroying property during the initial entry?

_____	X
Yes	No

(b) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the total

amount of damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of William Lappin?

Amount: $_____.

(If you find that Iris Mena suffered no actual damage, you must award her nominal damages in the amount not to exceed $ 1.00 (one dollar), but only if you answered "Yes" to part (a).)

Please proceed to the next question.

(c) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Jose Mena as a result of the conduct of William Lappin?

Amount: $_____.

(If you find that Jose Mena suffered no actual damage, you must award her [sic] nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a).)

Please proceed to the next question.

QUESTION NO. 2:

(a) Do you find that defendant Vincent Allegra violated plaintiff Jose Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable search by unnecessarily using excessive force on the door into the bedroom known as the "converted porch area" at the home Jose Mena owned at 1363 Patricia Avenue?

_____	X
Yes	No

(b) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the total

amount of damages, if any, sustained by plaintiff Jose Mena as a result of the conduct of Vincent Allegra?

Amount: $_____.

(If you find that Jose Mena suffered no actual damage, you must award him nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a).)

Please proceed to the next question.

QUESTION NO. 3:

(a) Do you find that defendant Darin Muehler violated the Fourth Amendment rights of Jose Mena or Iris Mena to be from unreasonable search by permitting or causing the search of 1363 Patricia Avenue to be conducted at portions of the premises other than the bedroom of Raymond Romero and common areas, once Romero's bedroom had been identified?

_____ Yes X No

(b) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the amount of damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of Darin Muehler concerning the continuation of the search?

Amount: $_____.

(If you find that Iris Mena suffered no actual damage, you must award her nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a).)

Amount: $_____.

(c) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the

amount of damages, if any, sustained by plaintiff Jose Mena as a result of the conduct of Darin Muehler concerning the continuation of the search? (If you find that Jose Mena suffered no actual damage, you must award him nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a).)

Amount: $_____.

Please proceed to the next question.

QUESTION NO. 4:

(a) Do you find that defendant Robert Brill violated the Fourth Amendment rights of Jose Mena or Iris Mena to be from unreasonable search by permitting or causing the search of 1363 Patricia Avenue to be conducted at portions of the premises other than the bedroom of Raymond Romero and common areas, once Romero's bedroom had been identified?

_____ Yes X No

(b) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of Robert Brill concerning the continuation of the search?

Amount: $_____.

(If you find that Iris Mena suffered no actual damage, you must award her nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a).)

Amount: $_____.

(c) If and only if you answered "Yes" to part (a), then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Jose Mena as a result of the conduct of Robert Brill concerning the continuation of the search? (If you find that Jose Mena suffered no actual damage, you must award him nominal damages in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to part (a).)

Amount: $_____.

Please proceed to the next question.

QUESTION NO. 5: Do you find that either of the defendant officers named below violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by detaining her with force greater than that which was reasonable under the circumstances?

	Yes	No
Darin Muehler	X	___
Robert Brill	X	___

Please proceed to the next question.

QUESTION NO. 6: Do you find that either of the defendant officers named below violated plaintiff Iris Mena's right under the Fourth Amendment to the United States Constitution to be free from unreasonable seizure by detaining her for a longer period than reasonable?

	Yes	No
Darin Muehler	X	___
Robert Brill	X	___

Please proceed to the next question.

QUESTION NO. 7: Concerning Darin Muehler, if you answered "Yes" to either question 5 or question 6, then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of Darin Muehler concerning her detention? (If you find that Iris Mena suffered no actual damage, you must award her nominal damage in the amount not to exceed $1.00 (one dollar), but only if you answered "Yes" to either question 5 or question 6.)

Amount: $10,000.

Please proceed to the next question.

QUESTION NO. 8: Concerning Robert Brill, if you answered "Yes" to either question 5 or question 6, then answer this question: What do you find to be the total amount of damages, if any, sustained by plaintiff Iris Mena as a result of the conduct of Robert Brill concerning her detention? (If you find that Iris Mena suffered no actual damage, you must award her nominal damage in the amount not to exceed $ 1.00 (one dollar), but only if you answered "Yes" to either question 5 or question 6.)

Amount: $10,000.

Please proceed to the next question.

QUESTION NO. 9:

(a) If and only if you answered "Yes" to question 1(a), answer this question. Was the conduct of William Lappin concerning the initial entry through the front door malicious, oppressive or in reckless disregard of Iris Mena's rights?

Yes___ No___

(b) If your answer to the preceding question was "Yes", then what do you find to be the amount of punitive

damages, if any, that should be awarded to Iris Mena and against defendant Lappin?

Amount: $_____.

(c) If and only if you answered "Yes" to question 1(a), answer this question. Was the conduct of William Lappin concerning the initial entry through the front door malicious, oppressive or in reckless disregard of Jose Mena's rights?

Yes___ No___

Please proceed to the next question.

(d) If your answer to the preceding question was "Yes", then what do you find to be the amount of punitive damages, if any, that should be awarded to Jose Mena and against defendant Lappin?

Amount: $_____.

QUESTION NO. 10:

(a) If and only if you answered "Yes" to question 2(a), answer this question. Was the conduct of Vincent Allegra concerning the destruction of the converted porch area door malicious, oppressive or in reckless disregard of Jose Mena's rights?

Yes___ No___

(b) If your answer to the preceding question was "Yes", then what do you find to be the amount of punitive damages, if any, that should be awarded to Jose Mena and against defendant Allegra?

Amount: $_____.

Please proceed to the next question.

QUESTION NO. 11:

(a) If and only if you answered "Yes" to question 3(a), answer this question. Was the conduct of Darin Muehler concerning the continuation of the search malicious, oppressive or in reckless disregard of Iris Mena's rights?

Yes___ No___

(b) If your answer to the preceding question was "Yes", then what do you find to be the amount of punitive damages, if any, that should be awarded to Iris Mena and against defendant Muehler for continuing the search?

Amount: $_____.

(c) If and only if you answered "Yes" to question 3(a), answer this question. Was the conduct of Darin Muehler concerning the continuation of the search malicious, oppressive or in reckless disregard of Jose Mena's rights?

Yes___ No___

(d) If your answer to the preceding question was "Yes", then what do you find to be the amount of punitive damages, if any, that should be awarded to Jose Mena and against defendant Muehler for continuing the search?

Amount: $_____.

Please proceed to the next question.

QUESTION NO. 12:

(a) If and only if you answered "Yes" to question 4(a), answer this question. Was the conduct of Robert Brill concerning the continuation of the search malicious,

oppressive or in reckless disregard of Iris Mena's rights?

Yes___ No___

(b) If your answer to the preceding question was "Yes", then what do you find to be the amount of punitivedamages, if any, that should be awarded to Iris Mena and against defendant Brill for continuing the search?

Amount: $_____.

(c) If and only if you answered "Yes" to question 4(a), answer this question. Was the conduct of Robert Brill concerning the continuation of the search malicious, oppressive or in reckless disregard of Jose Mena's rights?

Yes___ No___

(d) If your answer to the preceding question was "Yes", then what do you find to be the amount of punitive damages, if any, that should be awarded to Jose Mena and against defendant Brill for continuing the search?

Amount: $_____.

QUESTION NO. 13:

(a) Concerning Darin Muehler, if and only if you answered "Yes" to either or both questions 5 and 6, answer this question: Was the conduct of Darin Muehler concern-ing the detention of Iris Mena malicious, oppressive or in reckless disregard of Iris Mena's rights?

Yes X No___

(b) If your answer to the preceding question was "Yes," then what do you find to be the amount of punitive damages, if any, that should be awarded to Iris Mena against Darin Muehler concerning her detention?

Amount $ 20,000

QUESTION NO. 14:

(a) Concerning Robert Brill, if and only if you answered "Yes" to either or both questions 5 and 6, answer this question: Was the conduct of Robert Brill concerning the detention of Iris Mena malicious, oppressive or in reckless disregard of Iris Mena's rights?

Yes X No___

(b) If your answer to the preceding question was "Yes," then what do you find to be the amount of punitive damages, if any, that should be awarded to Iris Mena against Robert Brill concerning her detention?

Amount $ 20,000

PLEASE SIGN AND RETURN THIS VERDICT FORM TO THE COURT

Dated: 6-21-01

/s/ [ILLEGIBLE]
FOREPERSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed July 25, 2001]

CASE NO.: CV 98-8512 AHM (AIJx)

IRIS MENA and JOSE MENA,
Plaintiff,

vs.

CITY OF SIMI VALLEY, *et al.*,
Defendants.

NOTICE OF MOTION AND MOTION TO ALTER OR AMEND JUDGMENT (F.R.CIV.P. 59(e) OR, ALTERNATIVELY, FOR NEW TRIAL (F.R.CIV.P. 59(a) AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW (F.R.CIV.P. 50(b); MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DAVID L. NYE

DATE: August 20, 2001
TIME: 10:00 a.m.
CTRM: 14

TO PLAINTIFFS AND TO THEIR ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on August 20, 2001, at 10:00 a.m. or as soon thereafter as the motion may be heard by the above-entitled Court, located at 213 North Spring Street, Los Angeles, California, defendants DARIN MUEHLER and ROBERT BRILL will and hereby do move

this Court to alter or amend the judgment pursuant to Federal Rules of Civil Procedure, Rule 59(e), or, alternatively, for a new trial pursuant to Federal Rules of Civil Procedure, Rule 59(a), and also renew their motion for judgment as a matter of law pursuant to Federal Rules of Civil Procedure, Rule 50(b).

This motion is made upon the following grounds: 1) the Supreme Court's opinion in *Saucier v. Katz*, 121 S.Ct. 2151 (2001), which explicitly rejects and overrules the Ninth Circuit's analysis of qualified immunity claims, constitutes an intervening change in controlling law and mandates that the defendants should be granted qualified immunity on Iris Mena's unlawful detention claim; 2) error of law occurring at time of trial with regard to the jury instructions on the issue of unlawful seizure; and 3) insufficiency of the evidence to support the award of punitive damages.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of David L. Nye, all pleadings and papers on file in this action, the minutes of the court clerk, the reporter's transcript, and upon such other matters as may be presented to the Court at the time of the hearing.

DATED: July 24, 2001

CARRINGTON & NYE

/s/ [ILLEGIBLE]
David L. Nye
Karen K. Peabody
Attorneys for Defendants

Supreme Court, U.S.
FILED
AUG 30 2004
OFFICE OF THE CLERK

(10)

No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,
Petitioners,

v.

IRIS MENA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONERS

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August 30, 2004 * Counsel of Record

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QUESTIONS PRESENTED

1. Whether, in light of this Court's repeated holdings that mere police questioning does not constitute a seizure, the Ninth Circuit erred in ruling that law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional "seizure" if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity.

2. Whether, in light of this Court's ruling in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted, the Ninth Circuit erred in ruling that a two to three hour detention of the occupant of a suspected gang safe-house while officers searched for concealed weapons and other evidence of a gang-related drive-by shooting was unconstitutional because the occupant was initially detained at gun-point and handcuffed for the duration of the search.

PARTIES TO THE PROCEEDING

Petitioners state that all parties to the proceeding in the court whose judgment is sought to be review are, in addition to those listed in the caption above:

Jose E. Mena, as plaintiff below;

City of Simi Valley
Randy G. Adams
Marvin Hodges
Roy Jones
Vincent Allegra
Alan McCord
Richard Thomas
Ronald Chambers
William Lappin
Arnold Baynard
Jeffrey Dominick
Jack Greenburg
Richard Lamb
Frank Ahlvers
John Adamczyk
Tim Brown, as defendants below.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioners' motion for summary judgment on qualified immunity grounds is reported at 226 F.3d 1031 (9th Cir. 2000) and is reproduced in the appendix to the petition for certiorari (Pet. App.) at 55a-72a. The judgment of the district court is unpublished and is reproduced at Pet. App. 48a-54a. The order of the trial court denying petitioners' Fed. R. Civ. P. 59(e) motion to alter or amend judgment is unpublished and is reproduced at Pet. App. 35a-47a. The opinion of the court of appeals affirming the trial court's judgment against petitioners is published at 332 F.3d 1255 (9th Cir. 2003) and is reproduced at Pet. App. 1a-22a. The order of the court of appeals denying rehearing en banc is published at 354 F.3d 1015 (9th Cir. 2004) and is reproduced at Pet. App. 23a-34a.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2003. An order denying petitioners' petition for rehearing and suggestion for rehearing en banc was entered on January 14, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

place to be searched, and the persons or things to be seized.

2. Section 1983 of Title 42 to the United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Ninth Circuit's decision in this case was a radical departure from this Court's Fourth Amendment rulings because the holdings below both restrict law enforcement officers' long-recognized ability to ask questions of citizens and undermine those same officers' power to control dangerous and fluid evidence-gathering efforts. First, the Ninth Circuit's decision that a question asked of a lawfully detained individual constituted an additional, unconstitutional seizure is at odds with this Court's consistent recognition that mere questions are not seizures under the Fourth Amendment. Second, the court of appeals' conclusion that petitioners violated the Fourth Amendment by handcuffing a group of occupants during a search of a suspected gang safe house for

weapons is incompatible with the logic of *Michigan* v. *Summers*, 452 U.S. 692 (1981), and with this Court's repeated recognition that officers as a matter of law may take reasonable measures to ensure safety during police-citizen encounters. The court of appeals compounded these two errors by concluding that its novel holdings were somehow "clearly established law" and that petitioners were therefore not entitled to qualified immunity. The Ninth Circuit reached this conclusion without pointing to a single case clearly establishing that petitioners' conduct was unconstitutional and without acknowledging the numerous decisions holding that actions similar to those taken by petitioners were reasonable. The judgment of the Ninth Circuit should be reversed.

1. On January 13, 1998, Delfino Vasquez, Ricardo Bravo, and Raymond Romero, all members of a gang known as the West Side Locos, attacked members of a rival gang in a drive-by shooting at 355 Bonita Drive in Simi Valley, California. See JA 215, 217. Bravo drove with Vasquez and Romero to 355 Bonita Drive, intending to confront members of the Varrio Simi Valley gang who lived there. See *id.* at 216. Bravo stopped the car outside the residence, and Vasquez and Romero opened fire on a group of individuals who were standing in front of the house. See *id.* at 216-17 Vasquez fired multiple shots from a .22 caliber handgun; Romero attempted to fire a chrome .25 caliber semi-automatic handgun, but his gun misfired. See *id.* at 216-18. The three men then fled the scene at high speed. See *id.* at 216. During their flight they disposed of the handguns; Vasquez threw his .22 caliber gun out the window, and Romero asked Bravo to stop the car while Romero hid his .25 caliber gun at the home of another West Side Loco. See *id.* at 217-18.

Darin Muehler and Robert Brill, the petitioners in this case, were dispatched to investigate the 355 Bonita Drive shooting. See JA 43, 215. At the time both were officers with the Simi Valley Police Department ("SVPD") and were assigned to a special gang unit. See *id.* at 43, 211-12. The victims at 355

Bonita Drive identified the shooters and gave a description of their vehicle, a light green Toyota Tercel. See *id.* at 215. Later that day SVPD officers apprehended Bravo, Vasquez and Romero at a nearby gas station in a car matching that description. See *id.* Although the men had already disposed of their weapons, the officers discovered a bullet in Bravo's pocket and found three more .25 caliber bullets on the floorboard where Romero was sitting. See *id.* at 217. Both Vasquez and Bravo confessed to their roles in the shooting, and they told the officers where to find the .22 caliber gun that had been thrown out of the car's window. See *id.* at 216. That handgun was later recovered. See *id.* at 217. Romero invoked his *Miranda* rights in response to questioning, and he was later released from custody. See *id.*

Vasquez and Bravo told SVPD officers that Romero possessed a chrome .25 caliber, semi-automatic handgun and that he had attempted to fire that handgun at the Varrio Simi Valley members on January 13. See JA 217-18. Vasquez and Bravo also told the officers that Romero had hidden the handgun at the residence of another West Side Locos member immediately after the shooting. See *id.* at 218. In addition, Officer Muehler learned from Gabriel Reyes, a member of Varrio Simi Valley, that Romero had threatened Reyes with a chrome handgun a few hours before the shooting at 355 Bonita Drive. See *id.* The officers' discovery that Romero had twice used a .25 caliber handgun to threaten or assault Varrio Simi Valley members was particularly significant, because a .25 caliber handgun had been used in the unsolved November 28, 1997, shooting of a Varrio Simi Valley member. See *id.* at 217. Officer Muehler believed that Romero likely had recovered the .25 caliber handgun that he had secreted after the drive-by shooting. See *id.* at 43, 218.

Officers Muehler and Brill learned from Romero's family that Romero was living at 1363 Patricia Avenue in a "poor house"—a single-family home that housed a number of individuals who rented space in rooms in the house, in the

furnished garage, and in motorhomes and vans parked in the backyard. JA 43-44, 145, 219-20. The officers confirmed this information by placing a phone call to 1363 Patricia Avenue; the call was answered by an individual who identified himself as "Raymond." See *id.* at 157, 220-21. Additionally, petitioners learned that Genaro Gonzalez, another member of the West Side Locos, was either living or had lived at 1363 Patricia Avenue. See *id.* at 78, 157-58, 219. Based on this information and their experience with gangs, the officers concluded that 1363 Patricia Avenue may have been a safe house for members of the West Side Locos. See *id.* at 158.

Officer Muehler secured a search warrant for 1363 Patricia Avenue on January 29, 1998, which authorized a search for, among other things, "[d]eadly weapons" and "evidence of street gang membership or affiliation with any street gang." JA 44, 210-11. The warrant authorized a search both of the house and of the vehicles on or adjacent to the property. See *id.* at 210. Petitioners were the investigating officers responsible for overseeing the search. See *id.* at 59-60, 147. In planning for the search, petitioners determined that the search would be a "high risk entry." *Id.* at 61 (testimony of Officer Brill); *id.* at 78-80 (testimony of Officer Muehler); see also *id.* at 51. In part this was because of the strong evidence that armed gang members could be present at 1363 Patricia Avenue. See *id.* at 50-51, 61, 173-74. The officers were not only wary of Raymond Romero; but also they were concerned that they might encounter Genaro Gonzalez and "other gang associates" at the residence. *Id.* at 51 (testimony of Officer Brill); see also *id.* at 61. Petitioners were also aware that 1363 Patricia Avenue had been the site of several violent incidents, including a domestic assault and a stabbing, and they knew that officers responding to the domestic assault had encountered resistance from several occupants. See *id.* at 55-59, 78-79, 91, 179-80. In light of these concerns, the officers decided to use a Special Weapons and Tactics (SWAT) team

to clear the residence and secure any occupants before the search. See *id.* at 50-51, 54, 61, 79-80, 173-74. During the week and a half prior to the search, petitioners met daily with other officers to plan the execution of the warrant in order to ensure the safety of both officers and occupants. See *id.* at 54, 145-46.

Petitioners and other SVPD officers executed the warrant at 1363 Patricia Avenue at approximately 7:00 AM on the morning of February 3, 1998. JA 62-63. The SWAT officers were armed and were wearing the outfits that they normally wore when executing search warrants, which included black vests marked with a badge and the word "police." See *id.* at 48. Respondent Iris Mena was asleep in her bed when a SWAT team officer broke down her padlocked door, pointed his weapon at her, and handcuffed her. See *id.* at 46-48, 95. The SWAT team discovered three other individuals in the trailers and motorhomes on the property and handcuffed each of them. See *id.* at 115, 136. Respondent and the other detainees were brought to a centrally located garage and remained there in handcuffs for the duration of the search. See *id.* at 90, 136, 153, 162. The garage was furnished with several beds, where respondent sat with the other occupants. See *id.* at 134. Respondent was wearing sweatpants and a long-sleeved shirt but not shoes when she was brought into the garage. See *id.* at 133-34. The officers soon brought her a jacket and shoes. See *id.* at 115, 134. She was permitted to move around the garage, and in fact she moved from one bed to another while the search progressed. See *id.* at 108, 136. Although respondent later testified that being handcuffed was uncomfortable, see *id.* at 105, she did not complain that the handcuffs were too tight and never asked that her handcuffs be loosened. See *id.* at 139.

Uncertain of the four occupants' connection to the West Side Locos and concerned that the occupants might interfere with the search, the officers did not remove the handcuffs after bringing the occupants to the garage. JA 72, 80-81.

Both petitioners testified that they restrained the occupants in handcuffs to foreclose the possibility that an occupant might resist or interfere with the search. See *id.* at 80-81, 83-84, 162. Officer Brill testified that, although respondent

> appeared to be compliant, in my experience many times when people are in handcuffs they are compliant. However, we didn't know what her full motivation was or her involvement at the scene. Although I did not have any indication to believe that she was a gang member herself, I didn't know what kind of a supportive role she may play to the gang or whether or not she was involved in any way o[r] associating with the gang members.
>
> My feeling was that if I had unhandcuffed her at that point, the possibility would have arisen that she would have at some point in[terfer]ed with our process. As an example, had she been friends with Mr. Romero and saw us recover something that could be somewhat damaging to him in the way of evidence, she may try to run or interfere or get in the way of our search. What that would necessitate is for us to now forcefully restrain her . . . [; t]hat process might injure her.

Id. at 80-81.

Officer Muehler similarly testified that the handcuffing was:

> for our safety as well as the individuals that we encounter . . . . [I]n my experience, they are much less likely to be involved and cause us to be involved in them. They are kept in a central location. They are, even though they're handcuffed, any discomforts they might have are addressed. . . . The reason we don't unhandcuff a large group of people, because then it requires us to . . . have numerous officers. We had two officers in that room [at 1363 Patricia Avenue] watching four people. If we had unhandcuffed those people, I

> would have had between six and eight officers. It's unsafe and it prevents problems.

Id. at 162.

Petitioners also testified that their decision to use handcuffs might have been different if other circumstances had minimized the potential threat that the occupants posed. JA 88-89, 195. For example, petitioner Muehler testified that he would have removed respondent's handcuffs "[h]ad she been the only occupant in that residence, had she been gravely disabled, had she been obviously pregnant, had she been elderly," or had she had other "health concerns." *Id.* at 195; see also *id.* at 88-89 (testimony of Officer Brill). The officers' testimony about the reasons they restrained the occupants of 1363 Patricia Avenue was uncontradicted at trial.

Knowing that the West Side Locos gang was "predominately made up of illegal immigrants," SVPD officers notified the Immigration and Naturalization Service (INS) before the search was initiated. JA 159-60. While respondent and the other occupants were detained, the SVPD officer guarding them asked for their names, date of birth, place of birth, and asked whether they were legal aliens. See *id.* at 106. Later an INS officer arrived at the garage and asked the occupants for their immigration documentation.[1] See *id.* at 106-07. The officers learned that one of the detainees was an illegal alien, and they took him into custody. See *id.* at 115-16. Like the others, respondent, who has a Salvadorian accent, was asked by an SVPD officer whether

[1] Respondent originally testified that an SVPD officer asked her for her name, date and place of birth, and immigration status and that the INS officer asked her for her immigration "papers." JA 106-07. On cross-examination, respondent claimed not to recall whether SVPD officers or the INS officer were questioning the occupants. *See id.* at 137. No other witness testified as to who asked the questions, in part because respondent never claimed at trial that the questioning violated the Constitution.

she was a legal alien. See *id.* at 106; see also *id.* at 98, 138. After she answered the SVPD officer, an INS officer asked for her immigration papers; she directed the officers to a purse in her room, in which they discovered her immigration documentation verifying that she was a permanent resident. See *id.* at 106-07.

The officers searched the whole interior of the house and the vans and motorhomes parked outside. JA 67. The search lasted approximately two hours,[2] and the officers discovered and seized a .22 caliber handgun with .22 caliber ammunition, a box of .25 caliber bullets, baseball bats with gang writing and other gang paraphernalia, and a quantity of marijuana. See *id.* at 82, 247-49. The officers found these items throughout the house—the .25 caliber bullets, blowgun, and one baseball bat were found in Romero's room; the .22 caliber handgun and ammunition were found in another resident's room; and one of the gang-inscribed baseball bats was found in a living room common to all residents. See *id.* at 82, 141, 247-49. After the search was complete, respondent and the other occupants were released. Pet. App. 3a, 59a; JA 156. Other than the initial handcuffing, respondent had no physical contact with the officers. See JA 137.

Respondent filed an action against petitioners under 42 U.S.C. § 1983, alleging that they violated her rights under the

[2] The officers who performed the search testified that the search lasted no longer than two hours. JA 74, 82-83 (testimony of Officer Brill that the search lasted "at most two hours"); *id.* at 156, 163 (testimony of Officer Muehler estimating that search lasted "[o]ne hour 45 minutes"). Respondent originally concurred with this assessment, estimating that she was held in the garage for "two hours" after the police videotaped the premises. *See id.* at 116. (Police videotaped the premises immediately after securing the occupants in the garage. *See id.* at 184, 187). After being recalled, respondent estimated that she was held for "two to three hours"—an assessment that still did not contradict petitioners' recollection. *Id.* at 191-92.

Fourth and Fourteenth Amendments by, *inter alia*, "arresting and detaining plaintiff IRIS Mena for an unreasonable time and in an unreasonable manner and without probable cause or reasonable suspicion." JA 19. Respondent's initial complaint, which she filed along with her father, Jose Mena, the owner of the house on 1363 Patricia Avenue, alleged multiple constitutional violations by the City of Simi Valley and eighteen police officers. See *id.* at 16-25. In addition to alleging that the officers unreasonably detained respondent, the complaint alleged that the search warrant and the execution of the search were overbroad, that the officers failed to comply with the "knock and announce" requirement, and that the officers needlessly destroyed property during the search. See *id.* Petitioners and their co-defendants argued that they had qualified immunity for any alleged wrongs, and filed a motion for summary judgment on that ground. Pet App. 59a-60a. The district court denied that motion and the Ninth Circuit affirmed that denial except for respondent's claim that the search warrant was overbroad, on which the Ninth Circuit agreed defendants were entitled to summary judgment. *Id.* at 59a-60a, 70a. At trial, a jury rejected all of plaintiffs' remaining claims save one: it found petitioners liable for violating respondent's Fourth Amendment right against unreasonable seizures. *Id.* at 50a-51a; JA 251-60. The jury ordered Officers Muehler and Brill to each pay respondent compensatory damages of $ 10,000 and punitive damages of $ 20,000. Pet. App. 53a. Petitioners filed a motion to alter or amend judgment under Fed. R. Civ P. 59(e), which the trial court denied. *Id.* at 35a-36a.

2. The Ninth Circuit affirmed the judgment, holding that the officers had violated Mena's clearly established constitutional rights in two ways. First, without even mentioning this Court's decision in *Summers*, the lower court concluded that the officers' detention of Mena violated the Fourth Amendment because it was objectively unreasonable to detain her at gun-point and to keep her in handcuffs during

the course of the search.[3] Pet. App. 8a-10a. The Ninth Circuit opined that the officers should have released Mena because she was not "the subject of th[e] investigation" and because in its judgment she "posed no immediate threat to the safety of the officers or others." *Id.* at 8a-9a (internal quotation marks omitted). The court concluded that the police were not justified in using any "heightened security measures" on Mena, but instead "should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest." *Id.* at 9a. (footnote omitted).

The court further held that the officers were not entitled to qualified immunity. Pet. App. 15a. It cited two cases that it believed "clearly established" the constitutional impropriety of handcuffing an occupant of searched premises during a *Summers* detention: *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), in which this Court reaffirmed that excessive force claims should be considered under a general standard of reasonableness; and *Franklin* v. *Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994), in which the Ninth Circuit held that handcuffing a severely disabled detainee who was naked from the waist down was so "degrading" and "unusual" that it violated the Fourth Amendment. The Ninth Circuit panel did not mention any of the several decisions from other federal courts recognizing that officers may restrain *Summers* detainees without violating the Constitution.

Second, the panel held that the officers had violated Mena's clearly established constitutional rights "by inquiring unnecessarily into her citizenship status" and held that "these facts alone" constituted a Fourth Amendment violation. Pet. App. 10a. The panel reached this novel conclusion

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[3] These two facts were the sole basis for the Ninth Circuit's holding that petitioners used excessive force. The Ninth Circuit did not suggest (and the evidence could not support) any allegation that the handcuffs were overly tight or that the officers used unreasonable force in any other way.

notwithstanding that Mena had never claimed at trial or on appeal that the officers' questioning alone was a seizure. See *id.* at 27a & n.3, 34a n.2. Nevertheless, the panel held that, because the officers did not have a "particularized reasonable suspicion" that Mena was not a citizen, they were forbidden to ask her any questions about her immigration status. *Id.* at 10a (emphasis omitted). Furthermore, the panel concluded that the officers were not entitled to qualified immunity because the impermissibility of asking questions was clearly established law. In support of this conclusion, the panel cited only to *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975), which required officers to have reasonable suspicion before stopping individuals to investigate their immigration status. See Pet. App. 14a. The panel did not explain how a decision requiring reasonable suspicion for a stop clearly established that officers needed reasonable suspicion to question an individual who had already been lawfully detained.

3. Over the votes of seven dissenting judges, petitioners' suggestion for rehearing en banc was denied. Pet. App. 24a, 25a, 33a. The dissenting judges pointed out that the panel's conclusion that an officer's questions about citizenship created a Fourth Amendment violation was a proposition that directly conflicted with a decision of the Seventh Circuit and that "[n]o reasonable police officer would have imagined . . . was the law." *Id.* at 26a (Kleinfeld, J., dissenting), *id.* at 33a (Gould, J., dissenting). Furthermore, the dissenters argued that the panel's conclusion that the manner in which Mena was detained violated the Fourth Amendment eviscerated *Summers*' ruling that "'a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.'" Pet. App. 30a (Kleinfeld, J., dissenting) (quoting *Summers*, 452 U.S. at 705); see also *id.* at 33a (Gould, J., dissenting). The dissenters concluded that,

> [f]or their own safety and the safety of other occupants, reasonable police officers cannot be held to know that it violates the Constitution to detain for two or three hours a woman fully dressed except for bare feet during a lawful search of a house with many padlocked doors, known to house a member of a gang involved in a drive-by shooting.

Id. at 31a (Kleinfeld, J., dissenting); see also *id.* at 33a (Gould, J. dissenting) ("We should instead be more alert to the officers' legitimate concerns for safety.").

SUMMARY OF THE ARGUMENT

The Ninth Circuit erred by finding that petitioners violated respondent's Fourth Amendment rights simply by questioning her about her immigration status and by restraining her and three housemates during the execution of a lawful search warrant for gang-related items and weaponry.

I. Mere questions are not seizures, as this Court has repeatedly recognized. Seizures occur only when there is "meaningful interference . . . with an individual's freedom of movement." *United States* v. *Jacobsen*, 466 U.S. 109, 113 n.5 (1984). When an individual has already been lawfully seized, questioning, without more, does not "meaningfully interfere" with her freedom. Indeed, this Court has recognized in analogous settings that officers may question individuals who, as a practical matter, are not free to avoid the questions simply by leaving. See, e.g., *Florida* v. *Bostick*, 501 U.S. 429, 436 (1991); *INS* v. *Delgado*, 466 U.S. 210, 218 (1984). Such questioning is permissible as long as it is not so coercive or intimidating that a reasonable person would believe that her freedom was contingent on a response. Because the officers' questioning of respondent involved no such coercion or intimidation, the questions did not result in any "seizure" within the meaning of the Fourth Amendment.

Even if petitioners needed reasonable suspicion to ask respondent about her immigration status, they had such a suspicion here. They knew that two members of a gang that consists primarily of illegal immigrants resided or had resided in the house where respondent was found sleeping; that the house itself might be a safe house for that gang; and that respondent spoke with a foreign accent. These facts gave petitioners sufficient reason to suspect that respondent might be associated with the gang and that, like many of its members, she too might be in the country illegally. As California peace officers, moreover, petitioners were fully authorized to investigate possible violations of federal immigration law. At a bare minimum, petitioners are entitled to qualified immunity with respect to their questioning of petitioner, inasmuch as no law "clearly established" that they could not inquire about her immigration status in the circumstances they confronted. To the contrary, this Court's decisions established that their questioning was not a "seizure" at all, and thus that a separate showing of reasonable suspicion was not a predicate to such conduct.

II. Petitioners likewise did not violate respondent's Fourth Amendment rights by handcuffing her along with three other able-bodied occupants of 1363 Patricia Avenue during a lawful, two-hour search of those premises for weapons used in gang-related violence. This Court's decision in *Michigan* v. *Summers* allows officers to detain occupants of searched premises when a search warrant for contraband is executed. *Summers* clearly contemplates that officers have the ability to use reasonable force to restrain such detainees, for the decision would be meaningless if officers could not restrain detainees who wished to leave the premises.

Moreover, two underlying purposes of *Summers* detentions—to ensure safety and to prevent the destruction of evidence—would be completely undermined if officers facing the situation that petitioners confronted were not permitted to use restraints. Petitioners discovered multiple occupants in a

suspected gang safe house in which they were searching for (and finding) weapons. Such a search poses an acute risk of danger, and it is entirely reasonable for the officers involved to eliminate or at least reduce that danger by detaining persons at gun-point in order to assert unquestioned authority at the outset of the search, and thereafter using handcuffs to restrain detainees while the search progresses. The uncontradicted testimony at the trial below, as well as the realities of police work, confirm the propriety and reasonableness of such measures in the circumstances that petitioners faced. The use of such measures in these circumstances is certainly not sufficient to bring this case within the "unusual case" exception to *Summers*. 452 U.S. at 705 n.21. The unusual case exception only applies to particularly abusive and egregious conduct, not to precautionary detention measures used in a manifestly dangerous situation. At a minimum, petitioners are entitled to qualified immunity with respect to their detention of respondent, because no law clearly established that their initial use of drawn guns and their subsequent use of handcuffs were impermissible under *Summers*.

ARGUMENT

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY QUESTIONING RESPONDENT ABOUT HER IDENTITY AND IMMIGRATION STATUS.

Petitioners did not violate the Fourth Amendment by asking respondent about her identity or her citizenship. Mere questioning is not a "seizure" within the meaning of the Fourth Amendment. Nor does it become a seizure, requiring an independent showing of reasonable suspicion, simply because the person being questioned has already been lawfully detained. A contrary ruling would invalidate routine investigative techniques long understood to be permissible. In all events, even if reasonable suspicion were required in

the circumstances of this case, that standard was more than satisfied here, given the information known to petitioners when they encountered respondent at 1363 Patricia Avenue.

A. The Fourth Amendment Permits Officers To Question Lawfully Seized Detainees, Whether Or Not The Officers Have Reasonable Suspicion.

The Ninth Circuit affirmed the verdict in this case on the theory, not argued in the district court, that mere questioning of a lawfully detained person violates the Fourth Amendment.[4] That conclusion is manifestly mistaken.

Whether the questions asked of respondent violated the Fourth Amendment is a constitutional question that this Court should review *de novo*. See *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). In the first place, this theory of liability was never presented at trial, and therefore the jury never made any findings on it. Respondent did not argue at trial or on appeal that the questioning contributed to a constitutional violation, let alone that the questioning alone violated the Fourth Amendment. Indeed, the questioning was not even mentioned in her closing argument or in the jury instructions. Even if the jury had found that petitioners' questions violated the Constitution, that legal conclusion is a question of law that should be determined *de novo*. See *id.* (holding that determinations of probable cause and reasonable suspicion should be reviewed *de novo*); cf. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (holding that determinations of whether punitive damages awards are unconstitutionally "excessive" should be reviewed *de novo*).

[4] Although the panel suggested that the search of respondent's purse was a factor underlying its alternative basis for finding a Fourth Amendment violation, Pet. App. 14a, that additional fact has no weight in the constitutional calculus. Respondent's purse was plainly encompassed by the search warrant itself, which authorized a search for, *inter alia*, "address books . . . items of identification, utility and telephone receipts, prescription bottles, financial instruments/records, mail correspondence, keys, [and] photographs." JA 210-11. Moreover, the record indicates that respondent consented to the search by directing the officers to her purse. *See id.* at 106-07. Accordingly, the panel's alternative basis rests on mere questioning of a lawfully detained person.

This Court has made clear that a "seizure" of a person requires "meaningful interference . . . with an individual's freedom of movement." *Jacobsen*, 466 U.S. at 113 n.5; see also *California* v. *Hodari D.*, 499 U.S. 621, 624 (1991). For this reason, "mere police questioning does not constitute a seizure."[5] *Bostick*, 501 U.S. at 434; *Delgado*, 466 U.S. at 216; *Florida* v. *Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *United States* v. *Mendenhall*, 446 U.S. 544, 553-54 (1980) (plurality opinion). Law enforcement officers may ask questions of individuals they approach on the street, on a bus, or at their work, "even when . . . [they] have no basis for suspecting a particular individual." *Bostick*, 501 U.S. at 434-35; see also *Delgado*, 466 U.S. at 218.

Police questioning only becomes a seizure when it is "coercive." *Bostick*, 501 U.S. at 435-36; see also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (holding that the purpose of the Fourth Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals"). In other words, the police conduct must be "so intimidating as to

[5] Still less could a question be a "search" under the Fourth Amendment. To "'search'" is to "'look over or through for the purpose of finding something,'" "'to explore,'" or "'to examine by inspection.'" *Kyllo* v. *United States*, 533 U.S. 27, 32 n.1 (2001) (quoting N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)). "Searching" requires an invasion or infringement on an expectation of privacy—something that a mere question cannot do. *Jacobsen*, 466 U.S. at 113 (holding that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed"). No individual in society can reasonably expect not to be asked questions. *See Kyllo*, 533 U.S. at 34; *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

demonstrate that a reasonable person would have believed he was not free to leave *if he had not responded*." *Delgado*, 466 U.S. at 216 (emphasis added). In the absence of such coercion, police questioning does not involve a seizure that must be justified by reasonable suspicion.

Contrary to the assumption of the Ninth Circuit, Pet. App. 14a, the fact that a person who is being questioned is unable, for reasons independent of the questioning itself, to leave or move about freely does not alter the constitutional permissibility of police questioning. Indeed, this Court has recognized that the police may question an individual whose ability to leave is limited by their travel plans, *Bostick*, 501 U.S. at 436, or by their employment obligations. *Delgado*, 466 U.S. at 218. As long as a reasonable person would not believe that his or her ability to leave depended on answering police inquires, police are free to question individuals whose freedom is, as a practical matter, already constrained.

The same result should apply to an individual whose freedom of movement has already been "meaningful[ly] interfere[d]" with because she has been lawfully arrested, stopped, or detained. *Jacobsen*, 466 U.S. at 113 n.5. Mere questioning, without more, does not further interfere with her freedom of movement. The outcome might be different if the questioning extends the length of the detention, or if officers communicate that the seizure will not end until their questions are answered. Absent such factors, which were not present here, however, questions do not become independent "seizures" simply because they are asked of an individual who is already lawfully detained.

Delgado is particularly instructive in this regard. In that case, INS agents systematically questioned workers at three factories about their citizenship status during a surprise investigation. 466 U.S. at 213. If a worker admitted to being an alien, the agents then asked to see the worker's immigration papers. *Id.* at 212-13. The agents wore badges and were armed, and armed agents were stationed near the

building's exit. *Id.* at 212. The Ninth Circuit held that the agents could not ask workers about their citizenship without reasonable suspicion that the questioned individual was an illegal alien. *Id.* at 214. This Court reversed, holding that the officers did not need reasonable suspicion to question the workers. *Id.* at 216. The Court recognized that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." See *id.* Although it was true that workers did not feel free to leave their place of employment, they were not seized because their ability to leave was restricted by factors unrelated to the questioning—namely, their obligations to their employer. See *id.* at 218. The INS officers' non-coercive questioning amounted to nothing more than "consensual encounters" and was not a Fourth Amendment seizure, even though the questions were put to individuals who were not free to leave and the agents knew that fact. *Id.* at 221.

Similarly, in *Bostick*, officers questioned an individual in "the cramped confines of a bus" just before the bus was scheduled to depart. 501 U.S. at 435. As a practical matter, Bostick was not free to leave because leaving the bus would have risked being left behind and possibly losing his luggage when the bus departed. *Id.* He argued that, in light of this practical inability to leave, police questioning without reasonable suspicion violated the Fourth Amendment. *Id.* This Court explained, however, that the relevant inquiry was not whether Bostick was "'free to leave,'" but rather "whether . . . the police conduct at issue was coercive." *Id.* at 435-36. Police were not forbidden from approaching Bostick to ask him questions or ask to see his identification "so long as the[y did] . . . not convey a message that compliance with their requests is required." *Id.* at 437. Although Bostick was not free to walk away, he was free to ignore the officers or to decline their requests.

The situation of a lawfully seized *Summers* detainee like respondent does not differ in a constitutionally meaningful way from that of the workers in *Delgado* and the bus passenger in *Bostick*. The latter were in "practical custody," whereas respondent was in formal custody. In all three cases, however, persons faced official questioning that they were not free to avoid. In all three, the critical inquiry is not the fact of custody, practical or legal, but whether the questioning itself was coercive.

In this case, as in *Delgado* and *Bostick*, the questions themselves were not coercive. Questions about respondent's identity and immigration status did not extend or alter the nature of her detention in any way.[6] Cf. *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451, 2459 (2004) (noting that state statute requiring individuals to identify themselves during investigative stops was constitutional in part because it "does not alter the nature of the stop itself: it does not change its duration, . . . or its location"). Nor were the questions asked in a way that "convey[ed] a message that compliance with the [officers'] requests is required." *Bostick*, 501 U.S. at 435. Respondent was no less free to refuse to answer petitioners' questions than a bus passenger confronted by police who "tower[ed] over" him "in the cramped confines of a bus," *id.*, or factory workers confronted by armed agents flashing badges during a surprise inspection while other armed agents guarded every exit. *Delgado*, 466 U.S. at 212. Because petitioners' questioning was not coercive, it did not violate the Fourth Amendment.

A contrary ruling would create an illogical contradiction in Fourth Amendment jurisprudence. "There is nothing in the Constitution which prevents a policeman from addressing

[6] Since Mena testified that she was questioned either by the officer guarding the detainees or the INS agent, none of the searching officers participated in the questioning. JA 116, 192. Therefore the questions did not extend the time it took to complete the search.

questions to anyone on the streets." *Terry* v. *Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring). And, as *Bostick* and *Delgado* make clear, an officer's ability to do so does not depend on whether the person questioned is free to walk away. There is no logical reason, therefore, why the propriety of questions asked without reasonable suspicion should depend on whether the questioned person's inability to escape the questioner is the result of independent factors or a lawful exercise of detention authority. Indeed, it is incongruous to conclude that otherwise permissible questions become unconstitutional solely because they are asked during an otherwise lawful detention.

Nor would such a rule make up in clarity what it lacks in logic. To the contrary, under the approach that the court below and other circuits have adopted, the permissibility of questioning detainees turns on whether the questions are sufficiently "related" to the purposes of the detention. See *United States* v. *Murillo*, 255 F.3d 1169, 1175 (9th Cir. 2001); *United States* v. *Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999); *United States* v. *Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *United States* v. *Barahona*, 990 F.2d 412, 416 (8th Cir. 1993). The boundary between questions that are permissibly "related" to the basis for a detention and those that are unconstitutionally "unrelated" will often be unclear. Indeed, in this very case, the officers were authorized to search for "evidence of street gang membership"; they knew that members of the gang who might reside at the premises were primarily illegal immigrants; they found respondent at those premises; and they were unsure of her connection to the gang. In these circumstances, it is far from obvious that respondent's immigration status was "unrelated" to her detention. See *infra* at 23-26. In all events, the Ninth Circuit's "relationship" test is not a "readily administrable rule[]" for officers forced to apply the Fourth Amendment "on the spur (and in the heat) of the moment." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001); cf. *Dunaway* v.

New York, 442 U.S. 200, 220-21 (1979) (White, J., concurring) ("[I]f courts and law enforcement officials are to have workable rules . . . [Fourth Amendment] balancing must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers").

Moreover, to hold that officers lose their authority to question when addressing a lawfully seized individual would upset settled and important law enforcement practices. The rule that officers are free to ask questions of individuals is one of the most important rules for effective law enforcement; "[a]sking questions is an essential part of police investigations." *Hiibel*, 24 S. Ct. at 2458; see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (noting that police questioning is a necessary "tool for the effective enforcement of criminal laws"); cf. *Texas* v. *Cobb*, 532 U.S. 162, 171-72 (2001) ("[T]he Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects."). Officers routinely question seized individuals in police stations, jail cells and on the street about topics that are unrelated to the seizure, and this Court has never suggested that such questioning could violate the *Fourth* Amendment. See, *e.g.*, *McNeil* v. *Wisconsin*, 501 U.S. 171, 173-74 (1991) (questioning on unrelated offense); *Mathis* v. *United States*, 391 U.S. 1, 3 (1968) (same); see also *United States* v. *Childs*, 277 F.3d 947, 950 (7th Cir.) (en banc) ("[A]n officer may interrogate a person in prison on one offense about the possibility that the inmate committed another. This is normal and, as far as we can tell, of unquestioned propriety as far as the fourth amendment is concerned."), *cert. denied*, 537 U.S. 829 (2002). Although a prisoner is certainly not free to go and although his freedom has been restrained by law enforcement, officers questioning a prisoner do not violate the Fourth Amendment because it is clear that the prisoner's release does not depend on cooperation with the questioning.

Indeed, the questions that petitioners asked respondent are particularly proper because they related to her identity. While

petitioners were free to ask any questions of respondent, this Court has recognized that questions relating to identity are particularly important to law enforcement. See *Hiibel*, 124 S. Ct. at 2458. And ascertaining the identity of illegal aliens serves an important government interest. See *Brignoni-Ponce*, 422 U.S. at 878 (recognizing "that the public interest demands effective measures to prevent the illegal entry of aliens"). In addition, questions relating to identity are particularly non-intrusive and reasonable. See *Hiibel*, 124 S. Ct. at 2458 ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."); cf. *Delgado*, 466 U.S. at 216.

In short, this Court's decisions applying the Fourth Amendment, as well as the necessities of effective law enforcement, require a recognition that officers may question lawfully detained individuals provided that questioning does not extend the length of the detention or indicate that the detainee's freedom is contingent on answers to those questions. This Court should reaffirm its recognition in *Bostick* that questioning is permissible unless it is coercive, and therefore it should reverse the Ninth Circuit's holding that the questioning in this case violated respondent's Fourth Amendment rights.

B. Petitioners Had Reasonable Suspicion That Respondent Was An Illegal Immigrant.

Even if petitioners needed reasonable suspicion to ask respondent about her citizenship, they had more than enough information to form such a suspicion here. Officers may detain an individual and question her about her citizenship or immigration status if they reasonably suspect that she is an alien illegally in the country. See *Brignoni-Ponce*, 422 U.S. at 881-82. The facts known to petitioners were more than sufficient to give rise to such a suspicion about respondent.

Petitioners knew from experience that the West Side Locos were "predominately made up of illegal immigrants." JA

159-60. The officers also knew that Raymond Romero and at least one other member of the West Side Locos resided or had resided at 1363 Patricia Avenue, and the officers reasonably surmised, based on their prior experiences with and knowledge about gangs, that 1363 Patricia Avenue may have been a safe house for the West Side Locos. See *id.* at 158. The officers thus reasonably suspected that the residents of 1363 Patricia Avenue were associates of the West Side Locos and might themselves be illegal immigrants.

When petitioners encountered respondent, she was asleep in a room at this house. This suggested that she was herself a resident of this potential safe house, and thus might herself be associated with the gang. In addition, English was not respondent's first language, and she spoke with a noticeable Salvadorian accent. See *Brignoni-Ponce*, 422 U.S. at 886-87 (recognizing that apparent Latino ancestry is a factor that can support reasonable suspicion in combination with other factors); see also *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002). Collectively, these facts are sufficient to justify a reasonable suspicion that respondent was an illegal alien.

Petitioners' inquiry therefore was not, as the Ninth Circuit suggested, "based on nothing more than [respondent's] name or ethnic appearance." Pet. App. 13a. On the contrary, petitioners had a particularized suspicion that respondent was an illegal alien based on a number of factors, the most significant of which was her residence in a house where at least two members of a gang of predominantly illegal aliens lived or had lived. Petitioner Muehler's uncontradicted trial testimony was that he had contacted INS *before* executing the search warrant because he knew that the members of the West Side Locos were predominantly illegal aliens. JA 159-60. It was respondent's suspected association with this gang that prompted the inquiry into her immigration status, not merely her "name or ethnic appearance."

Petitioners had the legal authority to investigate their reasonable suspicion. The Ninth Circuit's claim to the

contrary—that petitioners had "doubtful" authority to investigate immigration law violations, Pet. App. 13a n.15—is without merit. As California peace officers, petitioners were empowered to arrest for any "public offense" committed in their presence, including violations of federal criminal law. Cal. Penal Code § 836(a)(1); see *Gates* v. *Los Angeles Superior Court*, 238 Cal. Rptr. 592, 598 (Cal. Ct. App. 1987); 66 Op. Cal. Att'y Gen. 497, 500 (1983) ("[U]nless federal law specifically provides otherwise, state law enforcement officials have the authority to assist the enforcement of federal laws within their state and arrest persons for crimes against the United States."). At the time petitioners questioned respondent, both the Ninth Circuit and the Department of Justice's Office of Legal Counsel had opined that local police officers were empowered to detain or arrest aliens who had violated the criminal provisions of the Immigration and Naturalization Act. See *Gonzalez* v. *City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durger* v. *de la Vina*, 199 F.3d 1037 (9th Cir. 1999); Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel (Feb. 5, 1996), *available at* http://www.usdoj.gov/olc/immstopo1a.htm.[7]

Petitioners therefore had the authority to investigate crimes arising under 8 U.S.C. § 1304(e), which requires all aliens, including permanent residents, to carry their immigration documentation with them at all times. *See* 20 Op. Off. Legal Counsel, *available at* http://www.usdoj.gov/olc/immstopo1a.htm (recognizing that § 1304(e) was among the immigration statutes that could be enforced by local police officers). A

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[7] Indeed, in 2002, the Office of Legal Counsel concluded that state and local officers also have a degree of authority to arrest individuals for civil immigration violations. *See* Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), *available at* http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm.

violation of § 1304(e) is punishable as a misdemeanor. *Id.* Since the officers had the ability to arrest respondent for a violation of § 1304(e), they surely had the authority to ascertain whether she was complying with the statute by asking her for her name and immigration status. Petitioners therefore had full authority to investigate their reasonable suspicion that respondent was violating immigration laws and did not violate the Fourth Amendment by questioning respondent.

In all events, even if petitioners' questioning of respondent somehow violated the Constitution, they are entitled to qualified immunity because it was not clearly established that such conduct was unconstitutional.[8] In holding otherwise, the Ninth Circuit stated that "any reasonable officer" would have known that questioning respondent without reasonable suspicion was unlawful in light of *Brignoni-Ponce*. Pet. App. 15a. But *Brignoni-Ponce* articulated the standard for making *stops* to investigate suspected immigration violations, 422 U.S. at 884; it says nothing about the legality of questioning those already lawfully detained. If anything, this Court's decisions in *Bostick*, *Royer*, *Delgado*, and *Mendenhall* had all affirmed that officers do not need reasonable suspicion to engage in non-coercive questioning. A reasonable officer

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[8] The issue of qualified immunity is "fairly subsumed" within the first question presented, which asks whether petitioners' conduct was unconstitutional "in light of this Court's repeated holdings that mere police questioning does not constitute a seizure." Pet. (i). Qualified immunity is "intimately bound up with the . . . discussion" of the merits issue, *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540 (1999), inasmuch as analysis of this Court's precedents will determine not only the propriety of petitioners' questioning, but also whether they should have known that it was improper (if the Court concludes that it was). *See also Procunier* v. *Navarette*, 434 U.S. 555, 559 n.6 (1978) (issue of qualified immunity fairly subsumed in question whether negligent failure to mail prisoner's letters state a claim under § 1983). In addition, the issue was decided below, *see Kolstad*, 527 U.S. at 540, and raised in the petition itself. *See* Pet. 13 n.3.

acting in light of those decisions would not have known that questions that are permissible when asked of an individual on the street or cornered in a bus become unconstitutional when asked of a person who was detained during the execution of a search warrant.

Indeed, in 1993, the Fifth Circuit concluded from *Bostick* and *Royer* that mere questioning of a detainee could never amount to a seizure, *United States* v. *Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993), and other circuits followed its lead. See *Childs*, 277 F.3d at 949-50; *United States* v. *Jacobs*, 173 F.3d 426 (4th Cir. 1999) (per curiam) (table), *available at* 1999 WL 96121, at *2. Although other circuits, including the Ninth, had held that questioning of persons detained in certain circumstances could violate the Fourth Amendment, those courts addressed the analytically distinct situation of traffic stops. See, *e.g.*, *United States* v. *Baron*, 94 F.3d 1312, 1319 (9th Cir. 1996); *United States* v. *Botero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995); *United States* v. *Ramos*, 42 F.3d 1160, 1162-63 (8th Cir. 1994). Traffic stops are investigative stops governed by *Terry*'s requirement that the stop be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. The Ninth Circuit and other courts based their holding that traffic stop questions needed to be "related" to the purpose of the stop on *Terry*'s scope requirement. See *Baron*, 94 F.3d at 1319; *Botero-Ospina*, 71 F.3d at 788. These holdings therefore do not implicate *Summers* detentions, for the scope of a *Summers* detention is limited only by the time it takes to complete the search. *Summers*, 452 U.S. at 705.

Acting in 1998, petitioners could not have predicted that the Ninth Circuit would extend its holdings in traffic stop cases to the distinct area of *Summers* detentions, and could not have known that the Fifth Circuit's application of this Court's decisions would be rejected. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."

Wilson v. *Layne*, 526 U.S. 603, 618 (1999). Because petitioners could not have imagined that their questions were unconstitutional, they are entitled to qualified immunity for questioning respondent. See Pet. App. 26a (Kleinfeld, J., dissenting) ("No reasonable police officer would have imagined that this was the law, and no police officer ought to be prevented from asking about citizenship under these circumstances.").

In sum, the judgment of the court of appeals, holding that petitioners' questioning provided a basis for a constitutional tort action, should be reversed for three independent reasons. The questioning did not constitute a "seizure" within the meaning of the Fourth Amendment. In any event, the questioning was based at least on reasonable suspicion. Finally, the law was not so clear that petitioners could be stripped of their qualified immunity.

II. RESPONDENT'S DETENTION DURING THE EXECUTION OF THE SEARCH WARRANT DID NOT VIOLATE THE FOURTH AMENDMENT.

A. Using Reasonable Restraints To Control A Group Of Detainees During The Execution Of A Search Warrant Does Not Violate The Fourth Amendment.

The Ninth Circuit also erred by concluding that the officers violated the Constitution by initially detaining respondent at gun-point and thereafter restraining her and three other occupants in handcuffs while the house was searched. The Ninth Circuit's holding failed to appreciate the gravity of the danger faced by officers executing search warrants in fluid situations, and to recognize that *Summers* itself authorizes the reasonable use of force to restrain detainees. In this case, where officers who were searching for (and finding) weapons needed to control four separate occupants, the use of restraints to "exercise unquestioned command" of the premises was reasonable. *Summers*, 452 U.S. at 703; *Graham*, 490 U.S. at

396 (holding that claims that officers used excessive force during the course of a seizure should be analyzed under the "reasonableness" standard of the Fourth Amendment).

The reasonableness of petitioners' conduct is a constitutional question that this Court should review *de novo*. See *Ornelas*, 517 U.S. at 699; cf. *Leatherman*, 532 U.S. at 436. In *Ornelas* this Court recognized that the determination of whether a given set of factual circumstances constituted reasonable suspicion or probable cause was a mixed question of law and fact that should be reviewed *de novo*. *Ornelas*, 517 U.S. at 699. *De novo* review was required for these ultimate Fourth Amendment determinations because of the need to maintain "a unitary system of law," "to maintain control of, and to clarify, the legal principles" involved, and "to provid[e] law enforcement officers with a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *Id.* at 697-98 (internal quotation marks and citations omitted). These same concerns support *de novo* review for other determinations of Fourth Amendment reasonableness, such as the reasonableness of restraints used during a *Summers* detention. *De novo* review of the reasonableness of restraints used during *Summers* detentions is necessary to have a consistent body of law that gives clear guides to officers operating in dangerous and fluid situations. *De novo* review is particularly apt when, as here, the determination that petitioners' conduct was unreasonable was made by a jury. To allow the vagaries of a jury's determination of "reasonableness" to define the scope of the Fourth Amendment could create unacceptable inconsistencies. To be sure, the facts must be found in the light most favorable to respondent because of the jury verdict, but the ultimate decision of reasonableness remains one for the Court. Otherwise, to defer to a jury's interpretation of the Fourth Amendment would cede the judiciary's "province and

duty . . . to say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Therefore, this Court should review the reasonableness of petitioners' restraint of the four occupants during the search *de novo*.

In *Summers*, this Court held that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705. The Court concluded that such detentions were appropriate for two reasons. First, the "objective justification for the detention" created by the search warrant itself. See *id.* at 703. The warrant is an objective justification for detaining occupants because it shows that a neutral magistrate has found probable cause of criminal activity sufficient to justify a search of the premises. *Id.* Once a magistrate has verified that there is probable cause to believe that a home was being used to conceal evidence of criminal activity, "[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id.* at 703-04.

Second, powerful law enforcement interests justify the detention of occupants while a search warrant for contraband is executed. First, there is the "legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." *Id.* at 702. "[S]ometimes of greater importance" is "the interest in minimizing the risk of harm to the officers." *Id.* To control these risks, officers must "routinely exercise unquestioned command of the situation." *Id.* at 703.

This Court in *Summers* recognized that police officers' ability to detain occupants when executing search warrants for contraband must be "routine[]" and does not depend on a particular showing of danger. *Id.* Even though the facts in *Summers* suggested "no special danger to the police," the Court recognized that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to

sudden violence or frantic efforts to conceal or destroy evidence." *Id.* at 702. The inherent danger of executing search warrants justified a bright-line legal standard that allows officers to detain occupants and take complete command of searched premises.

The ability to detain occupants and assert unquestioned authority necessarily includes the ability to use force and threats of force. This Court has applied this logic in the related context of arrests and investigatory stops, recognizing that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. As the Court has recognized in this context, police officers need not "take unnecessary risks in the performance of their duties." *Terry*, 392 U.S. at 23. In the inherently dangerous and fluid enterprise of executing search warrants, this means that officers need not wait for signs of resistance, flight or violence before employing force or threats of force. Officers cannot be expected to combat these serious dangers by keeping one eye on the occupants they are guarding and the other on the areas they are searching. The safety of both officers and occupants requires allowing officers to use reasonable restraints when necessary in order to assert and maintain "unquestioned command of the situation." *Summers*, 452 U.S. at 703.

The search in this case is a telling example of a situation where officers would face a substantial risk of danger unless they could use reasonable restraints to "exercise unquestioned command" of the premises. Petitioners executed a search for weapons at a house that they reasonably suspected to be a gang safehouse. Although they did not find their prime suspect, Raymond Romero, on the premises, they did find four able-bodied occupants whose residence in the same house as Romero raised the possibility that they might be associated with or sympathetic to Romero. For all the police knew when executing the search warrant, one or more of the

occupants could have been a member of the West Side Locos. Given the gang's propensity toward violent conduct, the officers unquestionably viewed the search as a high-risk undertaking. Moreover, the number of occupants created the possibility that the police could lose control of the situation had one or more of the occupants chosen to resist or interfere. In that event, of course, both the police and the other occupants would be placed squarely in jeopardy. Finally, the actual discovery of weapons in several locations throughout the house, including common areas, gave the officers further reason to be wary of the individuals as the search progressed.

Petitioners were well aware that a seemingly calm situation could quickly turn violent. As petitioner Brill testified, the mere fact that persons who are handcuffed are compliant does not mean they will remain so if they are unhandcuffed. JA 74. Given the number of detainees and petitioners' justified wariness as to what the detainees might do if released, petitioners were justified in using handcuffs to control the situation.

Although Summers provides the more specific guidance as to how best to resolve this case, the same result would follow from applying the broader ruling in *Graham*. The Court in *Graham* established that the reasonableness of any particular use of force must be judged by "a careful balancing" between the intrusion on an individual's Fourth Amendment interests and the necessity for that intrusion. 490 U.S. at 396. Here, the intrusion on respondent's interests was negligible. Because she could be lawfully detained for the duration of the search, the only additional intrusion is the fact that she was kept in handcuffs during that lawful detention. That minimal intrusion must be balanced against the well-recognized "interest in minimizing the risk of harm to the officers." *Summers*, 452 U.S. at 702. Petitioners faced a particularly dangerous situation—detaining four occupants of a suspected gang safe house while executing a search warrant for weapons. *Summers* recognized how important it was for

officers in this situation to "exercise unquestioned command of the situation." *Id.* at 703. When "judged from the perspective of a reasonable officer on the scene," petitioners' conduct was eminently reasonable and did not violate the Fourth Amendment. *Graham*, 490 U.S. at 396.

B. The "Unusual Case" Exception To *Summers* Does Not Apply To The Reasonable Use Of Restraints.

In *Summers*, this Court recognized that particularly egregious police conduct would not be insulated from liability simply because it occurred during the detention of occupants. The Court noted that, "[a]lthough special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, . . . this routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant is not such a case." 452 U.S. at 705 n.21. The "unusual case" exception has no application to the reasonable use of restraints, particularly in a fluid and potentially very dangerous situation with multiple detainees like the one petitioners confronted.

The *Summers* Court gave no clear definition of what "special circumstances" would render a search unreasonable, except to suggest that such circumstances would only arise "in an unusual case." *Id.*; see also *id.* at 712 n.5 (Stewart, J., dissenting) (noting that the majority opinion "provides no criteria for identifying 'special circumstances' or for determining when a detention is 'prolonged'"). The Court did, however, spell out circumstances that would *not* be "special." *First*, the detention of an occupant who is not a suspect is not a special circumstance; *Summers* generally authorized detentions of occupants and did not require police to suspect occupants of any crime. *Id.* at 705. Thus, the Ninth Circuit's distinction in this case between suspects and non-suspects, Pet. App. 8a & n.5, draws no support from *Summers*. *Second*, the detention of an occupant during a search of several hours is not a special circumstance. By authorizing detentions "while a proper search is conducted,"

452 U.S. at 705, the Court recognized that detention was permissible for as long as it took officers to conduct and complete the search—"a potentially very long period of time." *Id.* at 711 (Stewart, J., dissenting). The Court was aware that "a detention 'while a proper search is being conducted' can mean a detention of several hours." *Id.*; see also *Harris* v. *United States*, 331 U.S. 145, 149 (1947) (noting that a "careful and thorough search" of a one-bedroom apartment lasted "approximately five hours"), *overruled in part on other grounds by Chimel* v. *California*, 395 U.S. 752 (1969). *Third*, the reasonable restraint of occupants is not a special circumstance. As discussed above, authorizing officers to detain occupants during a search necessarily authorizes the officers to prevent occupants from leaving and to use reasonable measures to restrain the occupants if necessary. The right to detain occupants logically implies the power "to use some degree of physical coercion or threat thereof to effect" the detention. *Graham*, 490 U.S. at 396. *Summers* would be meaningless if the only tool officers had to compel detainees to remain on the premises was their power of persuasion.

Because *Summers* clearly authorized the detention of non-suspect occupants for extended periods and the use of reasonable restraints to effectuate the detention, the "unusual case" in which detention is unreasonable must be limited to particularly abusive police conduct. Although this Court has never defined the scope of the "unusual case" exception, the circuit courts have generally limited its application to cases with especially egregious circumstances, such as the unnecessary strip-searching of detainees, see *Williams* v. *Kaufman County*, 352 F.3d 994, 1011 (5th Cir. 2003); the extended handcuffing of a disabled and partially nude man, see *Franklin*, 31 F.3d at 876-77; or excessively tight handcuffing for an extended period of time, see *Heitschmidt* v. *City of Houston*, 161 F.3d 834, 836 (5th Cir. 1998).

Far from being an "unusual case," petitioners' conduct in this case was eminently reasonable and justified under the circumstances. Petitioners executed a search warrant in a location with high potential for violence—the suspected residence of both a suspect in two gang-related shootings and another gang member. Petitioners discovered four occupants on the property; although Ray Romero was not among them, the officers' suspicion that the location was a gang safe house and the occupants' residence on the property gave the officers substantial grounds to be wary of each individual. And, when presented with a group of four such occupants, the officers were even more justified in taking the precaution of restraining the group in handcuffs. Having four detainees on the scene dramatically increased the risk that the officers would not be able to control the situation should one or more unrestrained occupants choose to resist the detention, interfere with the search, or seek to assist any occupants the officers chose to restrain. Even though the occupants may not have resisted at first, particularly in light of the surprise entry and show of reasonable, but overwhelming force, the experienced officers were well aware that the situation could change in an instant. Cf. *Terry*, 392 U.S. at 13 ("[H]ostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation."). Like the search for narcotics in *Summers*, petitioners' search for gang-related weapons was "the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Summers*, 452 U.S. at 702. The officers' "split-second judgment[]" that handcuffs would be necessary in a "tense, uncertain, and rapidly evolving" situation was more than reasonable, *Graham*, 490 U.S. at 397; indeed, it would have been unreasonable to fail to use some form of restraint in such a dangerous situation.

The Ninth Circuit's conclusion that the officers should have released respondent because it was "clear" that she did not

pose an immediate threat is precisely the sort of second-guessing made "in the peace of a judge's chambers" that this Court has rejected. Pet. App. 8a-9a; *Graham*, 490 U.S. at 396. The reasonableness of restraining the group of detainees during the search "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." 490 U.S. at 396. Reasonable officers on the scene were faced with four occupants, all of whom were living in a suspected gang safe house where at least two West Side Locos had resided. The potential danger of the situation was not dispelled by the occupants' failure to engage in active resistance after they were handcuffed. Reasonable officers well know that an individual who is cooperative at one moment may turn violent in an instant, a fact this Court recognized in *Summers*. 452 U.S. at 702. Moreover, despite the occupants' seeming passivity, the discovery of weapons throughout the house could only heighten the officers' concerns about all of the occupants. The officers' reasonable concern for their safety hardly could be dispelled while they were discovering a handgun, bullets, gang-inscribed baseball bats, and a blowgun during their search. In light of this well-supported justification for using handcuffs to restrain the occupants, the officers' reasonable conduct hardly constitutes an "unusual case."

In all events, even if this Court concludes that handcuffing the group of occupants that petitioners encountered was unconstitutional, petitioners are entitled to qualified immunity, because the law at the time they acted suggested that such conduct was permissible.[9] *Summers* itself

[9] The question of whether clearly established law warned petitioners that handcuffing the occupants violated the Constitution is "fairly subsumed" within the second question presented, which asks whether petitioners' conduct was unconstitutional "in light of this Court's ruling in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted." Pet. (i). Qualified immunity is "intimately bound up with the . . . discussion" of the merits issue. *Kolstad*, 527 U.S. at 540; *see Procunier*, 434 U.S. at 559 n.6. In addition, whether there was clearly established law on this issue was decided below, *see* Pet App. 15a, was briefed by both parties below, and was raised in both the petition and respondents' opposition to the position. *See* Pet. 18-19; Opp. 14-16.

contemplates that officers will use force to effectuate detentions and assert "unquestioned command." Prior to 1998, moreover, the Ninth Circuit and a number of other courts had recognized that handcuffs could be used in investigatory stops made under dangerous circumstances.[10] Courts had also recognized that safety concerns could justify using handcuffs to restrain *Summers* detainees. The Sixth Circuit had found that handcuffing detainees and forcing them to lie on the floor was "reasonable and proportional to law enforcement's legitimate interests in preventing flight . . . and in minimizing the risk of harm to officers." *United States* v. *Fountain*, 2 F.3d 656, 663 (6th Cir. 1993). It later approved the handcuffing of a group of *Summers* detainees where "[t]he search was for drugs, which may be associated with guns, there were five persons at the property when police arrived and there was reason to believe that the persons on the property might flee if not restrained." *United States* v. *Thompson*, 91 F.3d 145 (6th Cir. 1996) (table), *available at* 1996 WL 428418, at **4. And a district court had recognized that a 90-minute handcuffing of a *Summers* detainee was

[10] *See, e.g.*, *Alexander* v. *County of L.A.*, 64 F.3d 1315, 1320 (9th Cir. 1995) (officers had qualified immunity for detaining plaintiffs in handcuffs for an hour while waiting for a witness identification); *United States* v. *Smith*, 3 F.3d 1088, 1094 (7th Cir. 1993); *United States* v. *Saffeels*, 982 F.2d 1199, 1206 (8th Cir. 1992), *vacated on other grounds*, 510 U.S. 801 (1993); *United States* v. *Esieke*, 940 F.2d 29, 36 (2d Cir. 1991); *United States* v. *Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989); *United States* v. *Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993); *United States* v. *Hemphill*, 767 F.2d 922 (6th Cir. 1985) (per curiam) (table), *available at* 1999 WL 96121; *United States* v. *Taylor*, 716 F.2d 701, 709 (9th Cir. 1983); *United States* v. *Bautista*, 684 F.2d 1286, 1289-90 (9th Cir. 1982).

"more than reasonable." *Crosby* v. *Hare*, 932 F. Supp. 490, 493 (W.D.N.Y. 1996).[11]

Indeed, the Ninth Circuit itself recognized that, at the time of the search "it was not clearly established in . . . [any] circuit that simply handcuffing a person and detaining her in handcuffs during a search for evidence would violate her Fourth Amendment rights." *Meredith* v. *Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003).[12] Nor did petitioners have fair warning that detaining someone in handcuffs for the several hours it takes to conduct a search was unreasonable. In fact, when petitioners acted, courts had upheld detentions during searches longer than respondent's "2 to 3 hour" estimate. See, *e.g.*, *Bernstein* v. *United States*, 990 F. Supp. 428, 432-433 (D.S.C. 1997) (four-hour detention); *Barron* v. *Sullivan*, No. 93 C 6644, 1997 WL 158321, at *5 (N.D. Ill. Mar. 31, 1997) (three-hour detention); *Cole* v. *United States*, 874 F. Supp. 1011, 1037 (D. Neb. 1995) (three and a half hour detention); see also *Garavaglia* v. *Budde*, 43 F.3d 1472 (6th Cir. 1994) (per curiam) (table), *available at* 1994 WL 706769 (qualified immunity for six-hour and three-hour detentions); *Sims ex rel. Sims* v. *Forehand*, 112 F. Supp. 2d 1260, 1269-70 (M.D. Ala. 2000) (qualified immunity because Summers left "unsettled" when a detention is "prolonged"); *Daniel* v. *Taylor*, 808 F.2d 1401, 1405 (11th Cir. 1986) (per curiam) (qualified immunity for nearly three search because "the law

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[11] A number of state courts had also ruled that *Summers* detainees may be handcuffed. *See People* v. *Ornelas*, 937 P.2d 867, 870-71 (Colo. Ct. App. 1996); *Wilson* v. *State*, 547 So. 2d 215, 216-17 (Fla. Dist. Ct. App. 1989); *People* v. *Zuccarini*, 431 N.W.2d 446 (Mich. Ct. App. 1988); *State* v. *Banks*, 720 P.2d 1380, 1383 (Utah 1986); *State* v. *Schultz*, 491 N.E.2d 735, 739-40 (Ohio Ct. App. 1985).

[12] In *Meredith*, the court recognized that no law gave fair warning that using handcuffs to restrain a detainee during a search for evidence was unconstitutional, but denied qualified immunity for plaintiffs' claim that, for part of the detention, the officer kept her in painfully tight handcuffs and refused to loosen them. 342 F.3d at 1063.

is ambiguous as to when detention in conjunction with a lawful, premises search becomes impermissible").

The Ninth Circuit cited only two cases to support its conclusion that petitioners violated "clearly established" law: *Graham* v. *Connor* and *Franklin* v. *Foxworth*. *Graham* simply reaffirmed that excessive force claims should be judged by whether the use of force was reasonable under the circumstances, not by substantive due process standards. See 490 U.S. at 393-96. *Graham* did not apply this test to the facts before the Court, and thus gave no indication that handcuffing *Summers* detainees was unconstitutional.

Franklin v. *Foxworth* involved grossly "wanton[] and callous[]" conduct, 31 F.3d at 878, far removed from the petitioners' conduct here. The officers in that case were aware that the occupant, Mr. Curry, had advanced multiple sclerosis and was unable to walk or to sit up without assistance, yet they pulled him from bed and handcuffed him, nude from the waist down, in the living room. *Id.* at 874-75. They did not provide him with any covering for at least an hour, and did not return him to his room for over two hours. See *id.* The Ninth Circuit found that the officers "wantonly and callously subjected an obviously ill and incapacitated person to entirely unnecessary and unjustifiable degradation and suffering." *Id.* at 878. Particularly crucial to the court's determination was the officers' failure to give Curry some clothing or covering for his nakedness. *Id.* at 877 ("[W]e can conceive of *no* reason why Curry was not given clothing or covering before he was carried from his bed to the living room, so that his genitals would not be exposed to the view of 23 armed strangers."). A majority of the court also found it important that he was not returned to his bed after his room was searched. See *id.*

Franklin gave no clear warning that the handcuffing of a group of able-bodied and fully clothed individuals would be unconstitutional. Indeed, because of the court's particular focus on the officers' failure to cover Curry's exposed

genitals, *Franklin* did not even establish that the decision to handcuff a severely disabled man was unreasonable. Because the *Franklin* court held that both the failure to cover Curry and the failure to return him to his room together contributed to the "wholly unreasonable manner" of the detention, *id.* at 878, a reasonable officer could not be certain that the decision not to return Curry to his bed alone was enough to violate the Constitution. More importantly, the *Franklin* court did not opine on the reasonableness of handcuffing Curry. Indeed, the court did not mention the officers' decision to keep two other able-bodied occupants in handcuffs for the duration of the search. A reasonable officer would have no way of predicting that the handcuffing of able-bodied *Summers* detainees that passed without comment in *Franklin* would later be deemed unconstitutional. Because there was no law clearly establishing that handcuffing a group of *Summers* detainees during a search for weapons was unconstitutional, petitioners are entitled to qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

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(14)

No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER and ROBERT BRILL,
Petitioners,

vs.

IRIS MENA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the jury and district court erred by finding that petitioners violated the Fourth Amendment where the trial record shows that petitioners, inter alia, detained respondent in handcuffs for at least 15 minutes after the search ended, detained respondent in uncomfortable handcuffs for more than two hours without a law enforcement justification, and questioned respondent on the irrelevant subject of her immigration and citizenship status?

2. Whether the questioning of a lawfully detained individual about matters unrelated to the purpose of the detention and without probable cause or reasonable suspicion to believe the detainee engaged in the criminal activity constitutes a separate, unconstitutional "seizure" under the Fourth Amendment?

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The opinion of the court of appeals (Pet. App. 1a-108a) is reported at 332 F. 3d 1255 (9th Cir. 2003). The district court's judgment is unreported. Pet. App. 48a–54a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Introduction

The Fourth Amendment does not generally provide for arrests incident to searches, even a search authorized by a valid search warrant. This Court in *Michigan v. Summers*, 452 U.S. 692 (1981), did not authorize routine handcuffing or irrelevant interrogation of *Summers* detainees, nor did this Court approve the exceptional restraint on their liberty represented by a detention without a showing of probable cause. To accept these new principles, as petitioners ask this Court to do, would transform Fourth Amendment jurisprudence in a manner that unjustifiably erodes American freedoms.

The jury in this case, under proper instructions,[1] found that Iris Mena had been subjected to an unreasonable detention accompanied by the use of more force than was reasonable in the totality of circumstances. J.A. 255-256. There was ample

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[1] Petitioners do not challenge these jury instructions in this Court. Nor do petitioners challenge the jury's award of punitive damages against them and thus they do not challenge the jury's finding that petitioners acted with deliberate indifference to Ms. Mena's constitutional rights.

justification for this verdict in the trial record and the findings represented by the jury's verdict are entitled to deference.

Iris Mena, who was never a target of any police interest (J.A. 61), was kept in handcuffs for up to three hours in a cold, converted garage. J.A. 61, 71-72, 74, 105, 146. She was taken through pouring rain, without adequate clothing, to that garage. J.A. 103-103. She was handcuffed up to one hour after the search had been completed and without justification. J.A. 69, 75, 186-188.

After the first few minutes of this police operation it was clear that there was no justification for keeping Ms. Mena in handcuffs given the overwhelming force available to the petitioners and the absence of any evidence that any of the people the police found had committed any crimes or were in any way involved with the target of the police raid. There were no armed gang members at the scene.

Other officers actually found the target of these police operations, Raymond Romero, at his mother's nearby home at the same time the Mena search began. At that location, Mr. Romero was allowed to leave the premises after a brief detention and the receipt of a citation. J.A. 154-155. Given this disparity in treatment between Ms. Mena and Mr. Romero, it is not surprising that the jury dismissed petitioners' unsupported claims of justification and instead awarded punitive damages against them.

Petitioners' brief relies upon a version of the facts the jury rejected, as it had every right to do. Petitioners' arguments can be sustained only by viewing the evidence in this case in the light most favorable to them. This approach is not only at odds with the essential appellate function; it would be a violation of Ms. Mena's right to a jury trial. The jury in this case performed the vital function of evaluating the officers' claimed justifications and ensuring that residents in the City of

Simi Valley were not subjected to the abuse of power and discrimination that occurred in the course of this operation.[2]

B. Statement of Facts

On February 3, 1998, at approximately 7:00 a.m., no less than eighteen heavily armed officers of the Simi Valley Police Department, including members of the SWAT team, led by petitioners, forcibly gained entry into Iris Mena's home at 1363 Patricia Avenue to execute a search warrant relating to Raymond Romero. J.A. 45, 62-63, 146-147. Mr. Romero, who was not present at the time of the search, was a tenant of Ms. Mena's parents, the owners of the property. J.A. 104, 154.

Within minutes of the initial entry, the SWAT team cleared the residence and established the absence of any threat to the officers. J.A. 147-148. Instead, the officers were confronted with four non-threatening, non-suspects who had nothing whatsoever to do with the suspect, Raymond Romero, or with any criminal activity. J.A. 71, 84, 106, 115-16, 136.

Iris Mena, then eighteen years old (J.A. 97), was asleep in her bedroom located very near the petitioners' point of entry. J.A. 47. She was startled by a loud bang. J.A. 100. Her mother and father were both at work at the time of the search and thus Ms. Mena was alone and vulnerable. J.A. 99-100. The bang was immediately followed by the forced entry of at least one armed man in dark clothing into her locked room. The man pointed a semi-automatic weapon in her face as she awoke and ordered her to stand up and put her hands behind her back.

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[2] The jury also exonerated other officers at the scene and rejected other claims made by the plaintiffs in this case. J.A. 251-255. Thus, it is clear that the jury carefully considered the evidence before it and evaluated that evidence under the instructions provided.

J.A. 100-101. She complied and was grabbed by the hands and pushed face first onto the bed and handcuffed. J.A. 101.

Ms. Mena initially had no idea who the men entering her room were or why they had entered her home. J.A. 101-02. She feared that the men had come to rob or kill her and she was terrified. J.A. 101. She testified that during this initial encounter, no one identified himself as a police officer. J.A. 105, 122, 131. After being handcuffed, Ms. Mena was yanked up by the back of her shirt, pulled off the bed and led out to a converted garage. J.A. 101-02.

Ms. Mena was taken outside in order to reach the garage. Rain was pouring down and the ground was wet and cold. J.A. 103. Ms. Mena was wearing only green sweat pants, a black long sleeved shirt and no shoes. J.A. 102. She was marched through the winter rain with bare feet and no jacket. J.A. 102. Only after she had been exposed to the elements and made to sit in the damp garage in uncomfortable handcuffs for a half an hour to an hour did officers give Ms. Mena a jacket and some shoes to wear. J.A. 106, 114-115, 134.

While Ms. Mena was held in the garage in handcuffs, an officer asked her if she was a legal resident of this country, even though this question was irrelevant to the purpose of the search. J.A. 106. She was not asked for any other form of identification and petitioners had no reason to believe that Ms. Mena was a gang member. An INS officer, who petitioners brought with them on the search (J.A. 159-160), then asked Ms. Mena intrusive questions about her immigration status and demanded to see her papers. J.A. 106. Ms. Mena, a legal resident of this country (J.A. 98, 106), stated that her documentation was in her purse, which was still in her bedroom. A police officer retrieved the purse and searched it without Ms. Mena's permission. The officer handed the

documentation over to the INS agent. J.A. 106-107.[3] It is beyond serious dispute that Ms. Mena was not free to leave the garage at the point when she was asked these questions.

There is no evidence in the record that officers asked Ms. Mena or any of the other residents any questions about Mr. Romero or the West Side Locos, the target of their search. J.A. 76, 176. In fact, Ms. Mena could have assisted officers and reduced the damage officers did to the property and possessions in the house, but she was never asked for any assistance. Ms. Mena could have provided officers, for example, with keys to open the locked doors in the house. J.A. 70, 117, 120-122. Further, at no point did the officers indicate the slightest interest in Ms. Mena as a person with relevant information to Mr. Romero or any other target of their operation. J.A. 76, 194.

There was evidence that the officers went through the house ransacking it and making jokes and laughing about what they were doing. Petitioner Brill commented during the search that the house was "messy" and that his house "wouldn't be kept that way." J.A. 86. Another officer, while laughing, joked how he enjoyed "breaking stuff." J.A.119.

During her detention, while she listened to the destruction of property in the house (J.A. 107), Ms. Mena observed a female videotaping in the garage where she and the other residents were being detained. J.A. 110. Ms. Mena, who had not given the police permission to videotape her, was concerned about this additional intrusion into her privacy. J.A. 110. She asked an officer why she was being videotaped. Instead of alleviating her anxiety and treating her with a modicum of respect, the officer yelled at her that it was part of

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[3]Each of the four persons detained in the garage were questioned about their immigration status. J.A. 137. One person was taken into to custody by the INS as a result of this questioning. J.A. 115-116.

their job to do that, and gave her no further explanation about the videotaping. J.A. 110.

Ms. Mena was the only occupant present within the main house the morning of the search. She was not shown a search warrant or given an explanation for the search until after the search ended. J.A. 105, 122, 131. While she was held, she heard and saw officers breaking things, including a door, in her home, all without the slightest explanation. J.A. 107, 117-118. Ms. Mena made repeated attempts to elicit an explanation for her detention from the officers who were in the garage. J.A. 105. She received either evasive responses or no responses at all. *Id.* On at least one occasion, officers told Ms. Mena that they were not in charge of the operation and hence were not authorized to give her an explanation. J.A. 105. She could hear officers breaking doors and inflicting damage to property in her home, while she was detained in a garage and treated as a person with no rights. J.A. 107, 117-119.

Petitioners Brill and Muehler played a pivotal role in the operation. Petitioners supervised the execution of the search and were also in charge of overseeing the detention of the occupants of the house. J.A. 59, 146-147, 149. It was petitioner Muehler who ordered Ms. Mena and the three other persons found on the property to be taken to the converted garage near the main house. J.A. 153, 172. Petitioner Brill came into the garage several times during Ms. Mena's detention (J.A. 68), and could have released her from her handcuffs at any time. J.A. 72.

Petitioner Muehler acknowledged during trial that he and petitioner Brill were the ones in charge of overseeing the detentions, and that part of this task entailed addressing the questions of the individuals being detained. J.A. 146-147, 149, 176-177, 199-200. Petitioners never approached Ms. Mena to give her an explanation, or to show her a search warrant, even

though petitioners came to the garage during Ms. Mena's detention several times. J.A. 77, 105, 122, 131, 164.

Ms. Mena was detained in the cold garage in handcuffs for the duration of the search. J.A. 71-72. She testified that the handcuffs were "real uncomfortable," and that they became even more uncomfortable as time progressed. J.A. 105-106. Ms. Mena asked officers to remove the handcuffs but she was informed that "it was part of their job" to handcuff her, and that the "their highest officer" had ordered them to do so. J.A. 105. Given the officers' attitude, further requests were clearly futile under the circumstances.[4]

Petitioners justified their treatment of Ms. Mena by claiming they did not know the extent of her involvement with Raymond Romero, the main target of the search, and also claimed a generalized "concern" that she might interfere with the search. J.A. 80-81.[5] Petitioners did not claim that they had any reason to believe that any of the persons they actually found on the premises were connected with a gang or posed any particular threat to the officers. They had absolutely no information that Ms. Mena posed any threat or would interfere with the search if her handcuffs were removed.

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[4] Indeed, it was part of Ms. Mena's case before the jury that petitioners treated respondent so badly because they thought illegal aliens lived at the Mena's home, a home they described as a "poorhouse." J.A. 145. Moreover, petitioners had previously made a call to the Mena residence, though not for any gang affiliated activity. J.A. 80. Thus, the unnecessarily harsh treatment of respondent on the morning of the search could properly have been viewed by the jury as payback for petitioners' prior exposure to the Mena family and petitioners' negative view of the occupants of the Mena home.

[5] Petitioners' assertion that this testimony was "uncontradicted" (Pet. Br. 8) is wrong. Ms. Mena's entire case demonstrated that there was no basis for these unsupported "concerns."

At trial, officers admitted that they did not suspect Ms. Mena of being involved in any crime, and agreed with the observation that she was completely cooperative throughout the entire ordeal. J.A. 65-66, 84, 96, 198. Searches of Ms. Mena's person and room produced no contraband or any evidence of gang membership, or criminal activity of any kind. J.A. 68-69, 82. Petitioners never had any information that Ms. Mena or her family was connected to any gang or criminal activity. J.A. 65-66. Indeed, Ms. Mena was never questioned about any criminal or gang activity or about any subject other than her immigration status. J.A. 76, 194.

Moreover, petitioners knew that this was not a "gang safe house." J.A. 145. Petitioners in their affidavit of probable cause identified respondent's home as a "poorhouse." J.A. 219. Petitioners admitted at trial that on their visit to the location one month prior to the search they encountered several residents but no one who they identified as a gang member. J.A. 56, 179. Petitioners' information was that the only alleged gang member then residing at the home was Raymond Romero.[6] Thus, the claim that the manner in which this search was conducted was due to the concern officers had about who might be present at this location was properly rejected by the jury at trial.

The evidence was that petitioners had adequate personnel at their disposal to remove respondent's handcuffs after they cleared the residence. J.A.150. In fact, within minutes, the search site was deemed Code 4 "which means everything was calm and the risks were minimized." J.A. 147-148. The four detainees were guarded by one or two officers throughout the search.

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[6]Indeed, in the search warrant and affidavit, petitioner Muehler states that he received information that the only other suspected gang member who may have lived at the Mena residence no longer resided there. J.A. 219-220.

Both SWAT Commander Lt. Thomas and defense expert witness Joseph Callanan testified on cross-examination that standard police procedure is that non-suspect detainees, who pose no threat to police officers, should be released after they have been patted down for weapons and identified. J.A. 171-172 (Thomas); J.A. 198-199 (Callanan). Indeed, Mr. Callanan's testimony on cross-examination fully supported Ms. Mena's claim that petitioners had no justification for detaining her in handcuffs as long as they did. In addition, the tactical plan for this search provided for releasing non-suspect detainees from handcuffs after the securing of the premises by the SWAT team. J.A. 157.

Yet, Ms. Mena remained in the dank garage, handcuffed and in great discomfort, for between two to three hours. J.A. 72, 192 . Ms. Mena testified that her handcuffs were not taken off until she was brought into the living room. J.A. 122. There was videotaping of the living room which did not begin until after the search was completed. J.A. 69, 186-188. This post-search videotape, which has a time stamp indicating it was made two hours after the SWAT team's entry, does not show respondent in the living room at all. Instead, it shows petitioner Muehler completing paperwork in the living room while respondent remained handcuffed in a cold garage.

Petitioner Brill admitted that respondent was not released until at least ten to fifteen minutes after the search was concluded. J.A. 75. Ms. Mena testified that she was held as long as three hours. Therefore, the evidence at trial allowed the jury to find that Ms. Mena was held between 15 minutes and an hour after the conclusion of the search and that petitioners displayed a casual disregard of her rights. J.A. 69, 186-188. At trial, the officers provided no justification whatsoever for keeping Ms. Mena in restraints after the search had ended.

C. Proceedings Below

Ms. Mena filed an action pursuant to 42 U.S.C. § 1983 alleging, in relevant part, that the City of Simi Valley and eighteen of its officers, including petitioners, violated her rights under the Fourth and Fourteenth Amendments by unlawfully detaining respondent during the search of her home and by using more force than was necessary to do so. J.A. 16-31.

Before trial, all of the individual officers moved for summary judgment based on the affirmative defense of qualified immunity. The district court denied the motion as to all but one of the officers and the remaining officers filed an interlocutory appeal contending that the United States Supreme Court's decision in *Michigan v. Summers*, 452 U.S. 692, 705 (1981), gave them authority to detain residents during the lawful execution of a valid search warrant. On September 22, 2000, the Ninth Circuit held, *inter alia*, that the officers were not entitled to qualified immunity with regard to plaintiffs' claim that the circumstances of her detention violated the Fourth Amendment. *Mena v. Simi Valley*, 226 F.3d 1031, 1038-41 (9th Cir. 2000) ("*Mena I*"). The case was remanded for trial on plaintiff's remaining claims, including her unlawful detention claim.

On June 21, 2001, the jury found that petitioners violated plaintiff's Fourth Amendment rights by detaining her "with greater force than which was reasonable under the circumstances" and "for a period longer than reasonable." J.A. 255. The jury sided with petitioners on all other claims. J.A. 251-259. The jury awarded respondent $10,000 in compensatory damages and $20,000 in punitive damages against each of the petitioners. J.A. 256, 259-260.

On July 24, 2001, petitioners filed a Motion to Alter or Amend the Judgment, Or, Alternatively, for New Trial and Renewed Motion for Judgement as a Matter of Law. J.A. 261-

262. On September 6, 2001, the district court denied petitioners' motion in an extensive opinion. Pet. App. 35a-47a. The district court held that petitioners were not entitled to qualified immunity under the test established by this Court in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, the district court held that "taken in light most favorable to the party asserting injury [Ms. Mena]", the facts alleged showed that the officer's conduct violated a constitutional right. Pet. App. 38 a. In reaching this conclusion, the district court relied on the following facts: 1) Ms. Mena was eighteen years old at the time of her detention; 2) Ms. Mena was not suspected of any crime; 3) Ms. Mena posed no threat to officers and did not resist arrest or attempt to flee; and 4) in spite of the above facts, defendants "roused her from her sleep at gun point, pushed her onto her bed and handcuffed her, refused to inform her why she was being detained, called in the INS to question her about her citizenship status, and kept her handcuffed in a garage for two or three hours, even for a time after the search was terminated." Pet. App. 39a.

Second, the district court held that reasonable officers would have known that they were violating a clearly established right. Pet. App. 39a. The court found that *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994) and *Heitschmidt v. City of Houston*, 161 F.3d 834 (5th Cir. 1998) put petitioners on notice that holding a "detainee in handcuffs or failing to return her to her room after the residence has been secured and when there are sufficient officers present" would render a detention unreasonable. Pet. App. 40a. Petitioners appealed.

The court of appeals upheld the trial court's ruling in *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003) (*Mena II*). It found that there were ample facts demonstrating the existence of an unreasonable seizure in violation of the Fourth Amendment. Pet. App. 1a-22a. In particular, the court noted: 1) respondent was awakened abruptly by a loud noise

and opened her eyes tc find a person dressed in black pointing a gun in her face; 2) no officer during this initial encounter identified himself as an officer and respondent believed that the persons in her room had come to rob her; 3) the officers searched respondent and her room, yanked her up from her bed by her shirt, and led her out of the room in her pajamas; and 4) although it was raining and respondent was barefoot, the officers directed her outside and into a cold garage, where she was detained for two to three hours. *Id.* at 1261-1262; Pet. App. 6a-7a.

The court of appeals found that these "heightened security measures" were unjustified in light of the fact that it was clear Ms. Mena posed no threat to the safety of the officers; the search of her room and residence produced no evidence of gang membership; respondent was not a suspect in the crime; and, although the eighteen well armed officers, including members of the SWAT team, secured the house in a matter of minutes, she was handcuffed and detained for two to three hours. Based on these circumstances alone, the court concluded that her detention was objectively unreasonable and "unnecessarily degrading [and] prolonged." *Id.* at 1263; Pet. App. 8a-9a.

The court of appeals also found that the officers' questions about respondent's citizenship status and search of her purse for proof of citizenship also rendered her detention unreasonable. The court of appeals did not find this to be a separate seizure, but rather a factor which rendered her *Summers* detention unreasonable. *Id.* at 1264-1266; Pet. App. 10a-14a. However, it is clear that the court of appeals found respondent's detention to be unreasonable and in violation of the Fourth Amendment independent of its finding that the questioning of Ms. Mena was a violation of the Fourth Amendment.

SUMMARY OF ARGUMENT

The question presented by this case is whether police, when searching a house pursuant to a search warrant, have virtually unlimited authority to detain, handcuff, and interrogate an individual who happens to be present, even when there is no basis to suspect that she herself engaged in any criminal activity. Petitioners and their *amici* ask this Court to adopt a new bright line rule allowing routine handcuffing and interrogation of *Summers* detainees beyond the scope of the limited detention provided for in *Summers* and its progeny. This Court's cases are clear that law enforcement officers do not possess such unbridled authority, and that the detention, including the manner of detention, and questioning of a *Summers* detainee must be limited to that which is necessary to serve the legitimate law enforcement interests justifying this exception to the Fourth Amendment's probable cause requirement.

Under *Michigan v. Summers*, petitioners had the authority to detain Ms. Mena for a reasonable time while they diligently executed the search warrant. But, as this Court has emphasized, the reasonableness of a seizure depends "not only on *when* it is made, but also on *how* it is carried out." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

The jury and judge in this case found that petitioners' conduct violated the Fourth Amendment because of the manner in which Ms. Mena was detained during this search. *Michigan v. Summers* authorizes the detention of occupants of a home being searched for only three purposes: (1) to prevent occupants from fleeing if contraband is found during the search; (2) for officer safety; and (3) to facilitate an orderly search.

Though *Michigan v. Summers* provides for a bright line rule permitting the detention of occupants during searches pursuant to a search warrant, there is no basis in *Summers* or in

any other case of this Court, or in any other court, for a rule that allows the routine handcuffing of occupants during the course of such a search. Indeed, there is no case that adopts such a substantial intrusion into the lives of people subjected to a detention under *Summers*. Instead, under *Summers*, the police may detain occupants of a house being searched pursuant to a search warrant in order to achieve the law enforcement purposes justifying this exception. But detentions beyond that which are necessary to achieve these purposes, as occurred here, violate the Fourth Amendment.

This case involved no "split second" police decisions after the first few minutes of this operation. Petitioners had ample time to consider whether Ms. Mena should be kept in handcuffs. Nor were petitioners short-handed. At least one and often two officers guarded four harmless, innocent occupants of the property for the entire period of the search. The jury properly found that there was no justification for keeping Ms. Mena in handcuffs for such a long period of time under the circumstances.

No case authorizes the detention, much less handcuffing, of *Summers* detainees *after* the end of the search. Petitioners and the government simply ignore the uncontested fact that Ms. Mena was detained in handcuffs at least fifteen minutes, and as long as one hour, *after* the search ended. There is simply *no* justification under *Summers* or any other case for detaining or handcuffing a person after a search has been completed and the search, as here, has not developed probable cause or reasonable suspicion justifying further detention or questioning. Here, too, the jury was entitled to punish petitioners for such a blatant violation of Ms. Mena's rights, a violation that demonstrated petitioners' utter disregard for Ms. Mena's constitutional rights.

Although the abusive conduct revealed in the trial record is more than sufficient to justify the jury's verdict in this

case, the jury was also entitled to consider the other aspects of Ms. Mena's detention that render it unreasonable under the totality of the circumstances. In particular, taking Ms. Mena out of her home, without shoes, in the cold winter rain to a converted garage and waiting a half hour to give her adequate clothing was unreasonable and unjustified in the circumstances.

These officers should have known that this conduct clearly violated the Fourth Amendment. Petitioners' request that this Court transform their conduct into a bright line rule to govern police conduct across this nation is unwarranted and at odds with decades of jurisprudence requiring that detentions based on less than probable cause be no more intrusive than necessary to achieve the justifications that authorized the detention in the first place.

With respect to the questioning of Ms. Mena about her immigration status, respondent has never contended at any time that this questioning amounted to a separate, unconstitutional seizure, a fact which petitioners acknowledge in their brief. Pet. Br. 12. The court of appeals, contrary to petitioners' assertion, also never reached this conclusion. Rather, what respondent argued, which the Ninth Circuit accepted, was that the questioning of Ms. Mena was a factor that rendered her *Summers* detention unreasonable. Pet. App. 10a-14a. Therefore, whether the questioning of Ms. Mena was a separate seizure that violated the Fourth Amendment was not properly before the Ninth Circuit and is not appropriate for this Court to decide.

If this Court is inclined to rule on the separate questioning issue, the evidence at trial supports the conclusion that the questioning violated the Fourth Amendment. First, contrary to petitioners' claims, this case is not analogous to cases concerning police questioning of individuals on the street or in other public places. Here, Ms. Mena was detained in her home. This Court has held that the Fourth Amendment

provides special protection for people in their homes. *Kyllo v. United States*, 533 U.S. 27, 31, 40 (2001).

Moreover, the questioning of Ms. Mena was obviously coercive. Ms. Mena was handcuffed at gunpoint and kept in a garage under the watch of armed guards for two to three hours. The officers never told Ms. Mena why they were there. Under these conditions, it is clear that someone in Ms. Mena's position would not believe that she was free to ignore the officers' questions. There is also evidence that the questioning lengthened the time of Ms. Mena's detention. Petitioners concede, as they must, that questioning which is unduly coercive or which lengthens the time of the detention is impermissible without reasonable suspicion. Pet. Br. at 18.

Irrespective of whether the questioning was coercive or extended the duration of the detention, the questions were unrelated to any of the justifications for the *Summers* exception to probable cause, and thus were impermissible for this reason alone. The jury was entitled to find that the officers' claim that they needed to know about the immigration status of the detainees because some members of the West Side Locos gang were illegal immigrants was pretextual. Indeed, the officers' actions indicate that they had no interest in knowing whether any of the detainees were gang members. None of them were questioned about this issue at all. Petitioners simply brought an immigration officer to enforce the immigration laws in a manner wholly unrelated to the purposes of the search warrant.

Petitioners also lacked reasonable suspicion that Ms. Mena was an undocumented alien. Petitioners contention is based solely on Ms. Mena's national origin and her possible association with undocumented immigrants. This Court has held that neither of these factors constitute reasonable suspicion. *United States v. Brignoni-Ponce,* 422 U.S. 873, 885 (1975). In a state which has millions of people of Hispanic

national origin, any other rule would authorize widespread intrusions based on racial profiling.

Petitioners are not entitled to qualified immunity because the law was clear that questioning which is unduly coercive and lengthens the time of detention is impermissible without reasonable suspicion. Likewise, the law was clear that questions posed to a detainee seized on less than probable cause must be related to the reasons for her detention.

ARGUMENT

I. *MICHIGAN V. SUMMERS* AND ITS PROGENY DO NOT AUTHORIZE THE MANNER IN WHICH PETITIONERS DETAINED MS. MENA.

A. The Jury's Verdict is Entitled to Deference.

Petitioners pay lip service to their concession that, "[t]o be sure, the facts must be found in the light most favorable to respondent because of the jury verdict..." Pet. Br. 29. Yet, petitioners' brief presents a view of the "facts" entirely from petitioners' perspective, as though there were no jury verdict or contrary evidence.

Even if this Court applies the *de novo* standard applied in *Ornelas v. United States*, 517 U.S. 690 (1996), the starting point must be the evidence at trial viewed in the light most favorable to the verdict, as well as all reasonable inferences from these facts. The jury's determination in this case of the background facts on which they based their verdict "provide a context for the historical facts and when seen together yield inferences that deserve deference." *Id.* at 699. As this Court emphasized in *Ornelas*, "we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to

inferences drawn from these facts by resident judges and local law enforcement officers." 517 U.S. at 699. This is especially important here where the credibility of petitioners' justifications was tested before the jury and trial judge.

Thus, the evidence in this trial record is that there was no factual justification for maintaining Ms. Mena in handcuffs for the entire duration of this search and that Ms. Mena was detained in handcuffs for fifteen minutes to an hour after the search ended without any justification.

Under petitioners' version of *de novo* review, this Court is being asked to accept justifications for petitioners' actions which were before the jury and trial judge and which were rejected by both under the appropriate legal standard. Only if no reasonable jury could find petitioners liable, viewing the facts in the light most favorable to Ms. Mena, may the jury's judgment be reversed. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-153 (2000). Any other methodology would violate Ms. Mena's Seventh Amendment rights.

B. *Michigan v. Summers* and Its Progeny Did Not Authorize the Manner in Which Ms. Mena Was Detained in this Case.

1. *Michigan V. Summers* Authorizes a Limited Detention During the Search of a House for Specific Purposes.

Michigan v. Summers, 452 U.S. 692 (1981), does not authorize the "routine" handcuffing or any other heightened security measures by officers to detain residents at the scene of a search authorized by a valid search warrant. *Summers* allows for the limited detention of those present at a search location without a warrant but any additional intrusions on the rights of

such detainees must be justified by the specific law enforcement needs identified in *Summers* or must have some independent, additional justification. Detentions which are the functional equivalent of arrests, as here, can never be considered "routine" or "ordinary".

In *Summers*, the issue before this Court was whether law enforcement officers possessed the authority to detain an occupant without probable cause during the search of his residence pursuant to a valid search warrant. *Id.* at 694-695. Recognizing the general rule that seizures must be supported by probable cause, the *Summers* Court noted that some seizures "covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained" that they could be made on less than probable cause, provided there was a articulable basis for suspecting criminal activity. *Id.* at 699-700.

In order to determine whether the seizure of the defendant pursuant to a search warrant was valid, the *Summers* Court examined the "character of the official intrusion and its justification." *Id.* at 700-701. With respect to the "character of the official intrusion", the *Summers* Court emphasized that the seizure of the defendant was "substantially less intrusive" than an arrest. *Id.* at 701-702. This observation was certainly true of the detention in *Summers* itself. The defendant in *Summers* was not handcuffed, moved to another location, or restrained in any manner other than not being allowed to leave his residence during the search and was treated with respect. *Id.* at 693-694. This Court did not address the issue of handcuffs in *Summers*. The use of handcuffs has always been considered to elevate the intrusiveness of a search or seizure.[7]

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[7] *Dunaway v. New York*, 442 U.S. 200, 215 & n.17 (1979); *United States v. Glenna*, 878 F.2d 967, 972 (7th Cir. 1989) (use of handcuffs substantially aggravates intrusiveness of detention).

This Court contrasted the circumstances of Mr. Summers detention with the circumstances of the detention in *Dunaway v. New York*, 442 U.S. 200 (1979), where the defendant was taken into custody and interrogated on less than probable cause in violation of the Fourth Amendment. This contrast clearly indicated that detentions permissible under *Summers*, without additional justification, must be in "sharp contrast to...[a] custodial interrogation." *Id.* at 702.

The *Summers* Court found justification for such limited detention without probable cause during the execution of a search warrant justified by certain, specific law enforcement interests arising in this context. These justifications were: preventing flight in case incriminating evidence was found during the course of the search; minimizing the risk of harm to officers; and the facilitation of the orderly completion of the search. *Id.* at 702-703. Any intrusion based on less than probable cause must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Illinois v. McArthur*, 531 U.S. 326, 331 (2001).

These considerations, in conjunction with this Court's determination that there was an objective justification for the detention based on the magistrate's assessment that criminal activity was likely occurring on the premises, led this Court to conclude that "a warrant to search for contraband founded on probable cause implicitly carries with it the *limited authority* to detain the occupants of the premises while a proper search is conducted." *Summers,* 452 U.S. at 705 (emphasis added).

The *Summers* decision was predicated on the fact that such detentions would "add only minimally" to the intrusion already authorized by a search warrant. *Id.* 702. However, the *Summers* decision made clear that "special circumstances" or "a prolonged detention" and other detentions which are not "routine" were beyond the exception this Court was permitting.

Id. at 705 n. 21. Thus, *Summers* holds that officers may detain an occupant during a search as long as the detention is minimally intrusive and necessary to achieve the law enforcement interests of protecting officer safety, preventing flight, and facilitating an orderly search of the premises.

Contrary to what petitioners assert, this Court in *Summers* did not hold or even suggest that officers could routinely handcuff detainees for hours on end or subject them to questioning unrelated to the object of the search, or to otherwise cause them unnecessary pain or discomfort. This Court has never authorized detentions for even fifteen minutes beyond the completion of a search without any justification. Petitioners' concept of what ought to be considered a "routine" detention in the course of a search is not found in this Court's *Summers* decision.

Indeed, *Summers* cannot be read, as petitioners urge, as a per se authorization of the use of handcuffs during a *Summers* detention. *Summers* clearly indicates that detentions which resemble formal arrests, like the detention in *Dunaway,* are beyond the scope of the exception it created. Indeed, petitioners' interpretation of *Summers* ignores the *Summers* Court's statements that only "limited intrusions" on an individual's liberty may be made on less than probable cause. *Summers,* 452 U.S. at 699.

The detention in this case was anything but a "limited intrusion". Ms. Mena was awakened by men dressed in all black who pointed guns in her face. Ms. Mena was handcuffed, marched outside in the rain to the garage, and kept in handcuffs for as long as three hours. Ms. Mena was interrogated about her immigration status and had her purse searched without consent. Ms. Mena was also kept in restraints after the search was completed.

These circumstances establish that Ms. Mena's detention was the functional equivalent of an arrest and not the kind of limited intrusion authorized by *Summers*.[8] This Court has never permitted arrests on anything less than probable cause. *Dunaway*, 442 U.S. at 211-217.

Indeed, Ms. Mena's detention more closely resembles the detention in *Dunaway* than the one in *Summers*. Moreover, because Ms. Mena was questioned about her immigration status, her detention, like the one in *Dunaway*, possessed "coercive aspects likely to induce self-incrimination." *Summers*, 452 U.S. at n.15. In *Summers*, this Court justified the detention that took place in part because it did not have the coercive aspects that would likely lead to self-incrimination. *Id.* *See infra § II(B).*

Petitioners' interpretation of the scope of the *Summers* exception is also at odds with how this Court has treated other seizures made on less than probable cause. Petitioners and their *amici* essentially urge this Court to adopt a bright line rule allowing officers during a search pursuant to a warrant to routinely utilize intrusive restraints and methods of control regardless of the particular circumstances confronting the officers. However, in other similar contexts, this Court has refused to adopt such a bright line rule.

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[8]*See, e.g., Brown v. Illinois*, 422 U.S. 590 (1990) (likening seizure to an arrest where officers drew their guns, informed individual he was under arrest, and handcuffed him); *Kaup v. Texas*, 538 U.S. 626 (2003) (arrest had taken place where 17 year old boy was awakened in his bedroom at three in the morning by police, was handcuffed and taken out by police without shoes and dressed only in his underwear, was placed in a patrol car, and interrogated at sheriff's office); *Florida v. Royer*, 460 U.S. 491, 502 (1983) (Court considers an "arrest" to have taken place where defendant was taken to a room 45 feet from where he was initially stopped by police officers, was interrogated, and had his luggage searched); *Dunaway*, 442 U.S. at 215 & n.17 (listing handcuffs as a "trapping [] of a technical formal arrest).

In *Summers* this Court relied on *Terry v. Ohio* in holding that the defendant could be detained on less than probable cause. *Summers*, 452 U.S. at 698-701. As in the case of a detention during an authorized search, *Terry* permits officers to detain suspects briefly, in the absence of probable cause, for a particular purpose – i.e. that there is reasonable suspicion that the person has committed or is about to commit a crime. However, as the *Summers* Court recognized, in the absence of specific, articulable facts which demonstrate that the suspect may be armed and dangerous, a forcible detention will not be justified pursuant to *Terry*. *Summers*, 452 U.S. at n.9.[9]

The determination of whether a particular *Terry* stop is reasonable pursuant to *Terry* does not end merely because it was justified at its inception. *Terry* also made clear that the scope of the frisk had to be strictly limited to that "which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 U.S. at 26. If the search went beyond what was necessary to determine if the suspect was armed, it was no longer valid under *Terry*.[10] Thus, rather than developing a bright line rule, the *Terry* line of cases look to determine whether the scope of the search is justified by the circumstances which rendered the stop permissible. *Terry*, 392 U.S. at 19.

This Court's cases after *Terry* have insisted that the scope of a *Terry* stop be justified specifically by the law enforcement needs underlying this exception to the probable cause requirement. In *United States v. Sharpe*, 470 U.S. 675,

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[9]*See Ybarrā v. Illinois*, 444 U.S. 85, 88 (1979) (police executing a search warrant at a tavern could not invoke *Terry* unless the officers had individualized suspicion that the patron may be armed and dangerous).

[10]*See Sibron v. New York*, 392 U.S. 40, 65-66 (1968); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

685 (1985), this Court declined to adopt a bright line rule on the length of *Terry* stops. Instead, this Court stated that "common sense and ordinary human experience" should govern over rigid criteria. *Id.*

In *Florida v. Royer*, 460 U.S. at 500, this Court recognized that the scope of a detention made on less than probable cause must be carefully tailored to its underlying justification, and whether or not a particular detention is reasonable will vary "with the particular facts and circumstances with each case." *Id.*

Similarly, in *United States v. Brignoni-Ponce*, this Court held that when an officer's observations lead him to suspect that a particular vehicle may contain illegal aliens, he may stop the vehicle and investigate the circumstances that invoked suspicion. *Brignoni-Ponce*, 422 U.S at 881. However, the detention "must be 'reasonably related in scope to the justification for [its] initiation.'" *Id.* at 881; *accord United States v. Cortez*, 449 U.S. 411, 421 (1981). The *Brignoni-Ponce* Court therefore held that while an officer may question the driver and passengers about their citizenship and immigration status, as well as ask them about suspicious circumstances, any further detention or search had to be based on consent or probable cause. *Brignoni-Ponce*, 422 U.S. at 881-882.

A similar approach is warranted here rather than the bright line rule proposed by petitioners and their *amici*. That is, whether or not particular conduct during a detention is reasonable should depend on whether the conduct is reasonably necessary in light of the historical facts found by the jury to achieve the law enforcement interests identified by the *Summers* Court (officer safety, preventing flight in the case incriminating evidence is found, facilitating an orderly search). Detentions conducted in a manner that cannot be justified by these law enforcement interests violate the Fourth Amendment.

There is no compelling reason for adopting a bright line rule authorizing the police conduct at issue in this case as being "routine" during detentions authorized by *Summers*. There is no empirical basis for believing that detentions during the course of searches pursuant to a warrant inherently require the routine use of handcuffs for the entire period of the search. Many *Terry* stops occur in dangerous contexts, yet this Court has never established a per se rule authorizing "routine" handcuffing or other detention measures for people who are subjected to *Terry* stops.[11]

There is good reason for this in a free society. The consequences of accepting petitioners' limitless reading of *Summers* would be enormous for this argument has no logical stopping point. If this Court accepts petitioners' interpretation of *Summers*, it would mean that *Summers* authorizes the handcuffing as a matter of routine, even for hours, of children and the elderly or sick, regardless of whether there is any information that they pose a threat to officer safety and are likely to flee or destroy evidence. Under petitioners' reading of *Summers*, a search warrant for a restaurant or a bar would authorize the handcuffing of everyone present in the bar at the time of the search, including patrons, until the search was completed, perhaps for hours.

Similarly, a search warrant for an apartment building would authorize the routine handcuffing of every resident of the

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[11]The lower courts have also declined to adopt a per se rule authorizing the use of handcuffs in connection with *Terry* stops. To the contrary, lower courts have allowed the use of handcuffs in the context of a *Terry* stop only when justified by the enforcement needs which led to the creation of the *Terry* exception in the first place. *See United States v. Smith*, 3 F.3d 1088, 1094-1095 (7th Cir. 1993); *United States v. Merkley*, 988 F.2d 1062, 1064 (10th Cir. 1993); *United States v. Saffeels*, 982 F.2d 1199, 1205-1206 (8th Cir. 1992).

apartment building. This, in essence, is what happened in this case. None of the detainees lived with Raymond Romero or had anything to do with him. They had the misfortune of living in a place where Mr. Romero had a small apartment. The only difference between this and a more traditional apartment building is that Ms. Mena's parents are poor immigrants who rented some rooms to other poor immigrants.

There is nothing in *Summers* or any other case decided by this Court which suggests that these absurd results were intended. On the contrary, in *Ybarra v. Illinois*, 444 U.S. at 86, this Court held that a warrant to search a tavern and one particular bartender for heroin and other contraband did not authorize the police "to invade the constitutional protections possessed by the tavern's customers."

2. The Manner in Which Lower Courts Have Applied *Michigan v. Summers* is Inconsistent With Petitioners' Reinterpretation of *Summers*.

Lower federal courts have insisted that the manner in which *Summers* detentions are conducted must be justified by the three law enforcement justifications for this exception to the probable cause requirement. Petitioners mischaracterize the manner in which lower courts have applied *Summers*. Indeed, the cases cited by petitioners (*Pet Br.* at 34) actually reject, rather than support, petitioners' interpretation of *Summers* and petitioners' so-called "unusual case" exception.

Both *Williams v. Kaufman County*, 352 F.3d 994, 1008-1009 (5th Cir. 2003) and *Heitschmidt v. City of Houston*, 161 F.3d 834, 838 (5th Cir. 1998), held that detentions pursuant to a search warrant would only be lawful if the justifications for the detention (officer safety, preventing flight) outweighed the intrusiveness of the detention. In *Franklin v. Foxworth*, 31 F.3d

873, 976-878 (9th Cir. 1994), the court relied on the "totality of the circumstances test" in *Graham v. Connor*, 490 U.S. 386 (1989), to determine the lawfulness of the detention in that case. However, its analysis is entirely consistent with the uniform approach in the lower courts of requiring officers to justify the manner in which people are detained under *Summers* in the particular circumstances faced by the officers and in light of the rationale for this exception.

The lower courts have refused to employ a categorical approach to the manner in which *Summers* detentions are conducted and instead evaluate the intrusiveness of the detention balanced against the law enforcement interests presented by the actual circumstances facing the officers.[12]

Petitioners cite three cases in support of their theory that the circumstances of a *Summers* detention will only be found unreasonable in the context of exceptionally egregious police conduct. Pet. Br. 37-38; *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993), *United States v. Thompson*, 91 F.3d 145 (6th Cir. 1996) *available at* 1996 WL 428418, and *Crosby v. Hare*, 932 F. Supp. 490 (W.D.N.Y. 1996).

These cases do not support petitioners' reinterpretation of *Summers*. In each of these cases there was a particularized finding that the officers' conduct was reasonable in light of the circumstances they faced.

For example, in *United States v. Fountain*, 2 F.3d 656 (6th Cir. 1993), handcuffing the occupants and forcing them to lay face down during the search was justified by several

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[12] *See, e.g. Stuart v. Jackson*, 24 Fed. Appx. 943 (10th Cir. 2001) *available at* 2001 WL 1600722, 2-5; *Ingram v. City of Columbus*, 185 F.3d 579, 592 (6th Cir. 1999); *Baker v. Monroe Township*, 50 F.3d 1186 (3rd Cir. 1995); *Renalde v. City and County of Denver*, 807 F.Supp. 668, 671-672 (D. Colo. 1992); *Torres v. United States*, 200 F.3d 179, 184-186 (3rd Cir. 1999); *United States v. Rodriguez*, 68 F.Supp.2d 194, 109-110 (D. Puerto Rico 1999).

circumstances not present in this case. First, during a prior search of Fountain's home, Fountain was observed destroying contraband. Automatic handguns were also seized from his home. *Id.* at 659. Moreover, during the search, narcotics were found in Fountain's pocket and three firearms were found in the hall closet. *Id.* at 660. The *Fountain* court ruled that in light of these circumstances, the actions of the law enforcement officials were reasonable and proportional to their interests in preventing flight and minimizing the risk of harm to the officers. *Id.* at 663. In this case, Ms. Mena made no attempt to destroy evidence and was not suspected of engaging in any criminal activity. There was also no contraband of any sort found on her or in her room. The target of the search was not home. Thus, *Fountain* is readily distinguishable.

Petitioners' reliance on *United States v. Thompson*, 91 F.3d 145 (6th Cir. 1996) is also misplaced. There is no indication in *Thompson* of how long the defendant was restrained in handcuffs, or if the officer's promptly released him after the search was completed, or if he suffered discomfort during the time he was handcuffed, all of which could differentiate this case. Morever, the defendant in *Thompson* was a person suspected of selling drugs.[13] In this case, officers knew that Ms. Mena was not suspected of any criminal activity. *Id.* at 1.

Similarly, in *Crosby v. Hare*, 932 F. Supp.490 (W.D.N.Y. 1996), law enforcement officers possessed a warrant to search for contraband, in particular, illegal drugs at the plaintiff's home. *Id.* at 491-492. The plaintiff was suspected of selling drugs. *Id.* She was handcuffed for only approximately

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[13]Contrary to what petitioners assert, whether the person being detained is a suspect as opposed to an innocent bystander is an important distinction. *Ingram*, 185 F.3d at 592; *Baker*, 50 F.3d at 1193.

90 minutes, during which time she remained in the living room, and was released from her handcuffs as soon as the search was completed. *Id.*[14] Contrast that with this case where Ms. Mena, who was only 18, was held in handcuffs in a cold and damp garage for two to three hours, and kept in restraints after completion of the search even though she was not suspected of criminal activity.

Thus, what accounts for the different conclusions reached by the courts in *Fountain*, *Thompson*, and *Crosby* were facts unique to those cases which are not present here. None of these cases endorse the routine handcuffing of detainees pursuant to *Summers*. To the contrary, there are numerous lower court decisions from around the country which hold that handcuffing a person during a *Summers* detention is unconstitutional if not warranted by the particular circumstances facing the law enforcement officers.[15]

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[14]Although the plaintiff was initially naked when the officers entered her home, she was watched by a female officer during this period (who was the only person in the room with her) and was provided with clothes within 15 to 20 minutes from when officers first entered the home. *Id.* at 492.

[15]*Stuart*, 24 Fed. Appx. 943 *available at* 2001 WL 1600722 at 2-5 (jury entitled to find that handcuffing of occupants of residence during search and placing them in van, when occupants cooperated with search and made no threats, was objectively unreasonable); *Ingram*, 185 F.3d at 592 (6th Cir. 1999)(court rejects argument that *Summers* authorized police to handcuff occupants where occupants posed no threat); *Baker*, 50 F.3d at 1193 (pointing guns and handcuffing visitors to residence during a drug raid was not reasonable); *Renalde*, 807 F.Supp. At 672 (detention unreasonable where occupants were handcuffed for prolonged period of time and where there was no justification for handcuffing after initial sweep); *Rodriguez*, 68 F.Supp.2d at 110 (three hour detention in handcuffs after agents had secured premises and ascertained that defendant was not armed was unreasonable). The *Renalde* court also stated, "[w]ith 12 officers on the

The United States claims that the lower courts have routinely upheld the use of handcuffs in a *Summers* detention. U.S. Br. at 17, fn. 5. However, none of the cases cited by the government establish that handcuffing is "routine" and therefore per se reasonable during a *Summers* detention. Quite the opposite, these cases hold that the scope of *Summers* detentions must be related to the justifications which authorized the detention in the first place.[16] Many of the government's cases involve facts and circumstances which differ materially from this case.[17]

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scene the police could have easily satisfied their legitimate interests, for example, by allowing plaintiffs [4] to sit on couch in living room with an armed guard." *Renalde*, 807 F.Supp. at 672. A similar conclusion is mandated here given the presence of 18 officers.

[16]*See, e.g., Torres v. United States of America*, 200 F.3d 179, 184-187 (3rd Cir. 1999); *United States v. Guadarama*, 128 F.Supp.2d 1202, 1218 (E.D. Wis. 2001); *United States v. Fountain*, 2 F.3d at 664; *State v. Schultz*, 23 Ohio App.3d 130, 133 (Ohio Ct. App. 1985); *People v. Ornelas*, 937 P.2d 876 (Colo. Ct. App. 1996).

[17]*See United States v. Fulwood*, 86 F.3d 27, 29-30 (7th Cir. 1996) (handcuffs removed once premises were secured by officers); *State v. Apalakis*, 797 A.2d 440, 446 (R.I. 2002) (detention and questioning lasted five minutes); *Turner v. Sheriff of Marion County*, 94 F.Supp.2d 966, 979 (S.D. Ind. 2000) (detained in handcuffs for fifteen minutes); *Guadarama*, 128 F.Supp.2d at 1218 (fifteen minute detention in handcuffs); *United States v. Zuccarini*, 172 Mich.App. 11, 14 (M.I. Ct. App. 1988) (handcuffing and detention only occurred during time police were attempting to secure the premises). *Wilson v. State*, 547 So.2d 215, 216-217 (Fla. Dist. Ct. App. 1989) (No indication in opinion as to how long the suspect was detained). Had Ms. Mena been handcuffed only for the few minutes it took the SWAT team to secure the premises this would be a very different case.

In short, the government's cases do not establish any bright-line rule which automatically entitles officers to handcuff occupants during a *Summers* detention. In fact, the cases cited by the government apply particularized inquiries into justification for each such intrusion, as this Court's cases require and as the jury and trial judge here followed.

Petitioners also cite to a number of cases where the courts upheld detentions lasting two to three hours. Pet. Br. at 38. None of these cases, however, involve handcuffing, or the other conduct which this jury relied on to find this detention to be unreasonable. Rather, they are cases, like *Summers* itself, where the occupants were merely prevented from leaving while the search was being conducted. If Ms. Mena was allowed to sit in her living room without handcuffs only as long as the search itself lasted and was treated with a modicum of respect, the jury would not have found petitioners liable or imposed punitive damages against them.

Petitioners also rely on a number of cases where lower courts upheld the use of handcuffs during an investigatory stop. Pet. Br. at. 37, fn. 10. However, none of these cases create a bright line rule that allows for the routine use of handcuffs during a *Terry* stop. On the contrary, the cases acknowledge that there is no bright line rule for determining when police conduct exceeds the bounds of an investigative stop.[18] Indeed, in *United States v. Smith*, the court observed that the use of handcuffs would only be justified in the "rare" instance where it is demonstrated that the investigative stop could only be effectuated safely by the use of handcuffs. 3 F.3d at 1094. Thus, petitioners' cases support the conclusion that the use of handcuffs will render a detention unreasonable where it is not justified by the particular law enforcement interests that led to the creation of the exception to the probable cause requirement in the first place. No such justification was present here.

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[18]*See, e.g., United States v. Saffeels*, 982 F.2d 1199, 1205-1206 (8th Cir. 1992); *Merkley*, 988 F.2d at 1064.

3. The Manner In Which Ms. Mena Was Detained Was Unreasonably Intrusive.

When the evidence at trial is viewed in the light most favorable to Ms. Mena, it is clear that the way in which she was detained cannot be justified by officer safety, the prevention of flight, or the facilitation of an orderly search.

Indeed, the evidence at trial demonstrated that the officers did not believe that Ms. Mena was involved in any criminal activity prior to executing the search warrant. There was also no evidence that Ms. Mena was affiliated with any gang. After the search began, Ms. Mena complied with the officers' commands at all times and the officers conceded at trial that they did not believe she posed a threat. Further, there were 18 officers involved in the search and the premises were secured in a matter of minutes. There were more than enough officers to detain Ms. Mena without any additional restraints. This was not a case in which officers had to choose between officer safety and conducting the search.

There was simply no justification for the harsh manner in which Ms. Mena was treated. There was no justification for keeping her in handcuffs for so long. Ms. Mena experienced extreme discomfort from the handcuffs but the officers refused

to remove them.[19] She was detained and kept in handcuffs for as long as three hours in the damp garage.

Significantly, Ms. Mena remained in handcuffs for at least fifteen minutes to an hour *after* the search had been completed. No justification was offered or could be offered for this continued detention after the search was completed. Even a fifteen minute detention without justification was more than sufficient to justify the jury's verdict.

Indeed, in *United States v. Sharpe*, this Court carefully evaluated whether a *Terry* stop approximately twenty minutes in duration was too long. *Sharpe*, 470 U.S. at 687. In this case, petitioners detained Ms. Mena in handcuffs for almost that long after their search was over when there was *no* justification for Ms. Mena's continued detention, much less detention in restraints. Indeed, petitioners' callous treatment of this vulnerable eighteen year old woman is a cautionary tale of what might happen if this Court adopts the bright line rule sought by petitioners and their *amici*.

The coercive interrogation of Ms. Mena about her immigration status was an additional example of how

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[19]Petitioners assert that Ms. Mena does not have a claim of being placed in overly tight handcuffs because she never indicated to the officers that they were painful. Pet. Br. at 6. However, Ms. Mena's request to have the handcuffs removed was refused by an officer. Thus, she had no reason to believe that telling the officers the handcuffs were too tight would have resulted in relief. Moreover, the main point here is that a person in Ms. Mena's position should not have been forced to assert her right to be free from uncomfortable restraints when there was no justification for restraining her after the first few minutes of this operation.

petitioners exceeded the scope of the detention authorized in *Summers*.[20] *See* § II(B), *infra*.

The overall abusive and demeaning treatment of Ms. Mena was also something the jury was entitled to consider in evaluating the reasonableness of the manner in which this *Summers* detention was accomplished. This Court did not endorse such demeaning treatment in *Summers* and the jury was surely entitled to consider such facts as waiting thirty minutes to provide a coat and shoes for a handcuffed teenager taken by officers through the pouring rain from her bedroom to a cold converted garage.

The evidence at trial clearly established that petitioners far exceeded the limited authority *Summers* granted them to detain Ms. Mena. Nonetheless, petitioners argue in their brief that the scope of the detention of Ms. Mena was justified. However, the facts petitioners rely upon to support this conclusion were disputed in the record and therefore must be rejected by the Court as not being in the light most favorable to the verdict.

For instance, petitioners claim that they were executing a search warrant at a house that they reasonably suspected to be a "gang safe house." Pet. Br. at 31. This is contradicted by the fact that the warrant and affidavit for the Mena residence never referred to the residence as a "gang safe house" but rather a "poorhouse" comprised of multiple families living in a residence designed for one family. J.A. 219. Moreover, petitioners had been to the Mena residence before but no one they encountered fit the description of a gang member. J.A. 56, 179.

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[20]These issues are discussed in more detail in the *amicus curiae* brief filed by the National Association of Criminal Defense Lawyers.

As for petitioners' claim that the occupants of the Mena residence could have been members of the West Side Locos (Pet. Br. at 31-32), this is belied by the fact that Petitioner Brill testified that he had no information that any of the Menas were involved in any gang. J.A. 65-66. Moreover, the search warrant and affidavit fail to identify any other gang member besides Mr. Romero who may have been residing at the residence at the time of the search. J.A. 219-221.[21]

Petitioners claim that the handcuffing and the other conduct perpetrated against Ms. Mena were justified are also contradicted by the tactical plan developed by the officers prior to executing the search warrant. The tactical plan only called for a temporary detention in handcuffs of the occupants until the location was secured, the occupants were patted down and had provided their names and other information so the officers could complete Field Identification Cards. J.A. 157. As stated above, the evidence demonstrated that within minutes of storming the residence, the officers had safely secured the home. J.A. 147-148. There was also no testimony from any officer in this case that any of the occupants of the residence were anything but compliant with officer commands. Despite these facts, Petitioner Brill decided to keep each of the occupants, including Ms. Mena, detained in handcuffs during the entire search, essentially abandoning the tactical plan.[22] If anything, the circumstances before the officers after they secured the Mena home should have led them to release Ms. Mena and the other occupants from handcuffs and not the opposite. In fact, the target of the search, Mr. Romero, was not

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[21]Petitioners had information that the only other person suspected of being a gang member who may have lived at the Mena residence had already moved out. J.A. 219-220.

[22]Indeed, the officers failed to prepare the Field Identification Cards. J.A. 74-75.

treated in such a harsh fashion as Ms. Mena during a simultaneous search conducted at another residence. J.A. 154.

Overall, there was ample evidence before the jury to conclude that the manner in which Ms. Mena was detained was unreasonable in violation of the Fourth Amendment. The jury was entitled to reject petitioners' version of events given the substantial evidence which contradicted petitioners' claims.

C. The Officers Were Not Entitled to Qualified Immunity.

The district court in considering petitioners' post-trial motions analyzed the evidence in this case under the principles set forth by this Court in *Saucier v. Katz*, 533 U.S. 194, 201 (2001)[23] and properly rejected petitioners' claims after viewing the evidence before the jury in the light most favorable to the verdict.

In *Saucier,* this Court articulated the two-step qualified immunity analysis. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id. Second, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted". *Id.* at 202.

Section I(B) above establishes that the manner in which Ms. Mena's detention was accomplished in this case was unreasonable in violation of the Fourth Amendment. As such, whether petitioners are entitled to qualified immunity depended on whether their conduct violated "clearly established statutory

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[23]The questions presented in the petition do not include the issue of qualified immunity, thus, the issue is not properly before the Court. *See* U.S. Br. 22, fn. 7. SUP. CT. R. 14.1(a) ("[on]ly the questions set out in the petition, or fairly included therein, will be considered by the Court.").

or constitutional rights of which a reasonable person would have known." *Hope v. Pelzner*, 536 U.S. 730, 739 (2002); *accord Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284,1293 (2004). In *Hope*, this Court clarified that the factual situation from which the preexisting constitutional right was derived does not have to be "fundamentally similar" to the one before it when addressing qualified immunity. *Id.* at 740. Rather, qualified immunity can be overcome as long as prior decisions gave "reasonable warning" that the conduct in question violated the law. This means that officials can still be on notice that their conduct violates "established law" even in "novel factual circumstances." *Id.* at 718.

Petitioners are not entitled to qualified immunity. *Summers* and its lower court progeny provided petitioners with "reasonable warning" that detentions which are more intrusive than necessary to protect officer safety, prevent flight and facilitate the orderly search of the premises would be unlawful. *Summers*, 452 U.S. at 702-703. Indeed, *Summers* clearly states that the "character of an official intrusion" must be judged with respect to "its justification", and that prolonged and non-routine detentions could violate the constitution. *Id.* at 701, n. 21. In the face of this language, it is simply unreasonable to conclude, as petitioners do, that handcuffing a compliant and non-threatening occupant such as respondent for 2 to 3 hours, including keeping her handcuffed after the search was completed, was permitted by *Summers*. Nor is there any support in the post-*Summers* case law which offers any support for petitioners' conduct or their claim that *Summers* detainees may be routinely handcuffed.

Franklin v. Foxworth also provided petitioners with ample notice that their conduct during the search would be unlawful. *Franklin* put petitioners on clear notice that an otherwise lawful detention could become unlawful by virtue of the manner in which it is carried out. *Franklin*, 31 F.3d at 876.

Franklin held that "unnecessarily painful, degrading, or prolonged" detentions, as well as detentions that involve an "undue invasion of property", would be unreasonable. *Id.* at 876. *Franklin* also made clear that where officers had no reason to believe that the occupant committed any crime, was armed, or otherwise dangerous, heightened security measures such as handcuffing would be inappropriate. *Id.* at 876-877.

Petitioners argue that *Franklin* did not give "reasonable warning" that their conduct would be unlawful because the conduct in that case was more egregious than here. Pet. Br. at 39. First, petitioners' conclusion is debatable, as there is conduct in this case not present in *Franklin* that arguably makes this case just as egregious if not more so. In particular, the plaintiff in *Franklin* was never (1) kept in handcuffs **after** the search was completed, (2) kept in a cold and damp garage for two to three hours, or (3) interrogated about his immigration status and had his purse searched for proof of citizenship.

Second, petitioners ignore this Court's comments in *Hope* that conduct can be "clearly established" as being unlawful even if the factual situation from which the unlawfulness of the conduct was established is materially different. Petitioners essentially urge this Court to adopt the overly restrictive view of qualified immunity that was rejected in *Hope*. However, the fact that this case is not "factually identical" to *Franklin* does not preclude a finding that petitioners had reasonable notice that their conduct towards Ms. Mena was unlawful. The reasoning of a case can put petitioners on notice of unlawful conduct, which *Franklin* clearly does. *Hope, supra*, 536 U.S. at 741.[24] Indeed, the entire body of post-

[24]In trying to distinguish *Franklin*, petitioners emphasize the fact that the *Franklin* court failed to discuss the reasonableness of handcuffing two other individuals besides the plaintiff. Pet. Br. at 40. However, considering the other individuals did not have claims before the *Franklin* court, there would be no reason for the court to decide the reasonableness of their detention, and therefore nothing can be derived from the court's failure to address this situation.

Summers jurisprudence undermines petitioners' qualified immunity claim. There is *no* case which allows *Summers* detainees to be treated the way Ms. Mena was treated without substantial and specific justification for each intrusion beyond the detention itself authorized by *Summers*. *See* § I(B).

Indeed, in a case cited by petitioners, *United States v. Taylor*, 716 F.2d 701, 707 (9th Cir. 1982), the Ninth Circuit, as far back as 1982, ruled that a detention was not justified where it did not advance the governmental interests of officer safety and preventing flight.[25] Accordingly, for the reasons stated above, petitioners had "reasonable warning" that their conduct violated the law. The district judge properly denied petitioners' qualified immunity defense.

[25]As for *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), petitioners ignore that the court determined that Meredith's detention in handcuffs was not justified under the totality of the circumstances. *Id.* at 1062-1063. Nonetheless, the *Meredith* court found that the officers were entitled to qualified immunity on this claim because it had not been clearly established in any circuit that handcuffing a person and detaining her in handcuffs under the circumstances the officers faced in *Meredith, standing alone,* would violate the Fourth Amendment. *Id.* at 1063-1064. However, the case the *Meredith* court cites for this proposition, *Heitschmidt v. City of Houston*, 161 F.3d 834, 838-839 (5th Cir. 1998), held that there was no qualified immunity for a detention involving handcuffing that occurred in *1994*. Thus, *Meredith* is internally inconsistent in this regard.

II. THE QUESTIONING OF MS. MENA ABOUT HER IMMIGRATION STATUS IS NOT AN ISSUE PROPERLY BEFORE THIS COURT, BUT IF IT IS REACHED, THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE QUESTIONING VIOLATED THE FOURTH AMENDMENT.

A. The Questioning of Ms. Mena About Her Immigration Status Is Not An Issue Properly Before This Court.

The jury's verdict in favor of Iris Mena was based entirely on her being illegally detained in violation of the Fourth Amendment. There was no mention in Mena's complaint or at the trial of a Fourth Amendment claim based solely on Ms. Mena being questioned about her immigration status. Petitioners rightly make exactly this point in their brief: "Mena had never claimed at trial or on appeal that the officers' questioning alone was a seizure. . . ." Pet. Br. at 12. "This theory of liability was never presented at trial, and therefore the jury never made any findings on it. Respondent did not argue at trial or on appeal that the questioning alone violated the Fourth Amendment. Indeed, the questioning was not even mentioned in her closing argument or in the jury instructions." *Id.* at 16.

Therefore, the issue of whether the Fourth Amendment was violated by Ms. Mena's questioning was not properly before the Ninth Circuit and is not appropriate for this Court to decide. As Justice Scalia expressed, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties

before them." *Carducci v. Reagan*, 714 F.2d 171, 177 (D.C. Cir. 1983). This Court likewise has explained: "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural system contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal alone is competent to decide." *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941).

Nor did the Ninth Circuit hold that the questioning of Ms. Mena about her immigration status was by itself a seizure in violation of the Fourth Amendment. At no point in the opinion does the Ninth Circuit state that the questioning amounted to a separate, unconstitutional seizure. The Ninth Circuit's analysis focused on whether there were sufficient facts to support the jury's verdict that Ms. Mena's detention was unreasonable. In this context, the Ninth Circuit found that questioning Ms. Mena about her immigration status and searching her purse were among many factors that rendered the detention unreasonable. Pet. App. 10a-14a. The court did not rule that her questioning amounted to a separate unconstitutional violation.

In this case, it is particularly inappropriate for this Court to reach the issue of whether the questioning of Ms. Mena is an independent violation of the Fourth Amendment. If this Court affirms the court of appeal's conclusion that Ms. Mena was impermissibly detained and that the officers are not protected by qualified immunity, then anything that the Court says about the legality of the questioning is just dicta and, indeed, an impermissible advisory opinion. The jury's verdict will be upheld in its entirety as it was based solely on the grounds that the manner in which this detention was conducted exceeded what is permitted under *Michigan v. Summers* and not on the

grounds that the questioning about Ms. Mena's immigration status was a separate Fourth Amendment violation. The Court's opinion on the questioning issue would make no difference in the outcome of the case and thus would be an advisory opinion barred by Article III. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) (advisory opinions have been "disapproved by this Court from the beginning," citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (U.S. 1792)).

Moreover, if the Court finds that Ms. Mena's detention was illegal, then it is clearly established that her questioning also was illegal. *See, e.g., Dunaway,* 422 U.S. at 216-218; *Brown v. Illinois,* 422 U.S. at 601-605 (questioning following illegal arrest violates the Fourth Amendment and requires exclusion of confessions obtained). For this reason, too, if the Court finds that Ms. Mena was detained in violation of the Fourth Amendment, there is no issue of whether her questioning independently violated the Constitution.

On the other hand, if the Court concludes that Ms. Mena's detention did not violate the Fourth Amendment, the Court still should not reach the issue of whether questioning Ms. Mena about her immigration status independently violated the Constitution. Because this issue was not raised at trial or presented to the jury, the facts relevant to these issues were not fully developed. For example, petitioners maintain that the Fourth Amendment was not violated by the questioning "provided that questioning does not extend the length of the detention or indicate that the detainee's freedom is contingent on answers to those questions." Pet. Br. at 23. In other words, petitioners concede that questioning Ms. Mena about her immigration status violated the Fourth Amendment if either it lengthened the detention or the police indicated that Ms. Mena's freedom was contingent on her answers. But these issues were never specifically dealt with at trial. Thus, while

there is evidence which supports the conclusion that the questioning extended the time of the search and that Ms. Mena's freedom was dependent upon her answering the questions (*See Section II(B)(1)*), the record is incomplete. This Court should exercise its discretion and decline to decide these important issues on an incomplete record.[26]

However this Court resolves the issue of whether Ms. Mena's detention violates the Fourth Amendment, this case is not the proper vehicle for addressing whether questioning a detained individual raises a separate Fourth Amendment issue. Although this Court granted certiorari on the issue of whether the police questioning violated the Fourth Amendment, the Court should dismiss as certiorari having been improvidently granted on that question.

B. The Questioning of Ms. Mena About Her Immigration Status Without Reasonable Suspicion Violated The Fourth Amendment.

1. Reasonable Suspicion Was Required In Order For Ms. Mena to be Lawfully Questioned About Her Immigration and Citizenship Status.

Petitioners and the United States, as *amicus curiae*, misstate the issue. The question is not, as they assert, whether mere questioning is itself a violation of the Fourth Amendment. Petitioners and the United States frame the issue in this manner in order to convince this Court that petitioners were not

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[26]For additional reasons not to reach this issue, see the amicus briefs of the 1) American Civil Liberties Union ("ACLU") and 2) the National Latino Officers Association ("NLOA"), National Black Police Association ("NBPA"), and Hispanic American Police Command Officers Association ("HAPCOA").

required to have a reasonable suspicion to question Ms. Mena about her immigration and citizenship status.

But what petitioners ignore is that the issue here is much more specific: Is the questioning of a suspect detained in her home about a matter unrelated to the reason why she was detained, without reasonable suspicion, and under intimidating an coercive circumstances, a violation of the Fourth Amendment? None of the cases cited by petitioners and their *amicus* address this issue.

Indeed, contrary to petitioners' assertion and that of the United States (Pet. Br. at 17, United States Br. 22-23), this is not a case about the ability of the police to ask a question of a person on the street. Pet. Br. at 17. *See United States v. Drayton*, 536 U.S. 194, 200-201 (2002). Petitioners' and the United States' reliance on this Court's cases concerning questioning by law enforcement of individuals on the street or elsewhere in public essentially ask this Court to ignore the real context in which the questioning of Ms. Mena took place. But the actual context in which Ms. Mena was questioned is central to determining the lawfulness of the questioning in this case.

First, the questioning of Ms. Mena took place in her home, not on the street, the workplace, a bus, or any other public location for that matter. Not a single case cited by petitioners concerns questioning a person in his or her home. This Court has emphasized that the text and history of the Fourth Amendment create special protection for people in their homes. *See Kyllo,* 533 U.S. at 31.[27] Indeed, in the immigration context, the Court has said that police actions without

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[27]The *Kyllo* court quoted from *Silverman v. United States,* 365 U.S. 505, 511 (1961), when stating "'[a[t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his home and there be free from unreasonable government intrusion.'" *Kyllo*, 533 U.S. at 31; *Accord Payton v. New York*, 445 U.S. 573, 590 (1980) (Fourth Amendment draws "a firm line at the entrance to the house").

reasonable suspicion are different when "we deal neither with searches nor with the sanctity of private dwellings." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

Second, although the record on this issue was admittedly not fully developed, there is a great deal of evidence which supports the conclusion that the questioning of Ms. Mena took place under coercive conditions which conveyed to Ms. Mena that she was not free to ignore the officers' questions. As detailed above, the detention of Ms. Mena was the functional equivalent of an arrest and far exceeded the authority this Court granted law enforcement in *Summers* to detain occupants during a search. Ms. Mena was awoken on the morning of the search by an officer dressed in black who pointed a machine gun in her face. Ms. Mena was handcuffed in a rough manner, and led out in the pouring rain into the garage where she remained in handcuffs, watched by armed guards, for 2-3 hours, including being detained in handcuffs after the search concluded. During this entire time, no one ever informed Ms. Mena why she was being detained and what the officers' purpose for being there was. In fact, the officers refused to provide Ms. Mena with an explanation as to what was occurring despite her requests for an explanation.

These circumstances alone suggest an extremely coercive environment where Ms. Mena would not reasonably feel that she was free to ignore the officers' questions about her immigration and citizenship status. Indeed, because the officers did not indicate until after the search why they were there, for all Ms. Mena knew, the officers may have been there for the sole purpose of apprehending illegal aliens and finding proof of their illegal status.

The conclusion that the questioning took place under coercive conditions is bolstered by the fact that one of the occupants of the home was actually taken into custody by virtue of answers he provided about his immigration status.

Moreover, neither petitioners nor the United States deny that had Ms. Mena been silent in response to questions about her immigration status, she likely would have been arrested for immigration violations. Simply put, when, as here, a person is detained in handcuffs in his or her home, any questioning is inherently coercive and any reasonable person would believe that his or her release depended on answering the police questions. Thus, the record which is before this Court requires a finding that Ms. Mena's freedom was contingent upon her answering the questions posed to her by the officers.

Petitioners concede that questioning without reasonable suspicion which conveys that the person's freedom is contingent his or her answers is impermissible. Pet. Br. 18, 23. Petitioners must make this concession in light of this Court's precedent. For instance, in a case petitioners rely heavily upon, *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984), this Court held that questioning becomes a Fourth Amendment detention when "the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed that he was not free to leave if he had not responded."

The record before this Court also suggests that the questioning of Ms. Mena and the other occupants extended the duration of the detention. If the officers were not preoccupied with questioning Ms. Mena and the other occupants about their immigration status, as well as searching for proof of their citizenship, they could have assisted in the search and shortened the time of the search and consequently the length of the detention. Petitioners admit that the "outcome may be different if the questioning extends the length of detention." Pet. Br. at 18.

However, whether the questioning extends the duration of the detention or is coercive are not the only relevant inquiries in terms of assessing the reasonableness of the questioning. Petitioners' position in this regard contradicts the long line of

cases from this Court which hold that seizures made on less than probable cause must be limited in both duration and *scope*. *See, e.g., Royer, supra*, 460 U.S. at 500; *United States v. Hensley*, 469 U.S. 221, 235 (1985) (permissibility of *Terry* stop turns on "length and intrusiveness").

As demonstrated above, the scope of a seizure made on less than probable cause must be directly related to its justification. In *Summers*, the justifications articulated by this Court related to the execution of the warrant itself (officer safety, prevent flight, facilitate orderly completion of the search). Neither petitioners or the United States argue that questioning Ms. Mena about her immigration status was in any way related to these concerns, nor could they. *Summers* simply does not provide petitioners with the authority to conduct the interrogation of Ms. Mena that occurred, and therefore some independent justification is required. As such, this is an additional reason why reasonable suspicion was needed in order for the questioning of Ms. Mena to be permissible.

Petitioners assert that the "boundary between questions that are permissibly 'related' to the basis of detention and those that are unconstitutionally 'unrelated' often will be unclear." Pet. Br. at 21. But this Court often has drawn exactly that line, requiring that questioning be related to the purpose of the stop or search. In fact, in the immigration context, this Court explained that "the stop and inquiry must be reasonably related to the justification for their initiation. The officer may ask the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention must be based on consent or probable cause." *United States v. Brignoni-Ponce*, 422 U.S. at 881-882.

Ultimately, adopting petitioners' position would allow law enforcement officers to use *Summers* detentions in order to conduct custodial interrogations of individuals about their

immigration status where they would otherwise have no authority to do so. But if the officers would not be entitled to seize a person for the purpose of subjecting him to custodial questioning about his immigration status, they certainly should not be allowed to do this as a consequence of this Court's concern in *Summers* about officer safety, preventing flight and facilitating an orderly search.[28] Accordingly, unless the questioning of Ms. Mena about her immigration status was based on a reasonable suspicion, it was unlawful.

2. There Was No Reasonable Suspicion to Question Ms. Mena About Her Immigration and Citizenship Status.

Petitioners argue that there was reasonable suspicion that Ms. Mena was an illegal immigrant. Petitioners point to two factors, neither of which provides a basis for finding reasonable suspicion. Petitioners say that she was Latina, "English was not respondent's first language, and she spoke with a noticeable Salvadorian accent." Pet. Br. at 24. But this Court has been clear that race alone does not justify stopping and questioning a person. *United States v. Brignoni-Ponce*, 422 U.S. at 885. Petitioners' argument is that there is reasonable suspicion that anyone who is Hispanic in appearance and speaks with an accent is illegally present in the United States.

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[28]Contrary to the assertion made in the United States *amicus* (U.S. Br. at 26), ruling that the questioning of Ms. Mena was a factor that rendered her detention unreasonable will not hamper the ability of government officials to elicit voluntary responses from individuals about their immigration status. The government is free to question individuals whom they encounter in public about their immigration status, so long as the questioning is not unduly coercive. Ruling in respondent's favor will not change this fact.

Thankfully, that is not and hopefully never will be the law in this country.

The other factor pointed to by petitioners is that Ms. Mena lived in a house where there was a gang member and that it was a gang that included illegal immigrants. Pet. Br. at 23-24. But as petitioners point out in their Statement of the Case, the police knew before the search that this was a home where a number of individuals rented space. Pet. Br. at 4. The police had no basis whatsoever for believing that Ms. Mena was affiliated with the gang. The fact that she happened to live in a house where a suspected gang member rented space does not provide the slightest basis for suspecting her of anything impermissible. As this Court expressed in *Ybarra v. Illinois,* 444 U.S. at 91: "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *See also Sibron v. New York*, 392 U.S. at 62. Suspecting Ms. Mena because she lived with her parents on a property where a suspected gang member rented space is nothing but guilt by loose association and has no place in our criminal justice system. *See United States v. Lane,* 474 U.S. 438, 475 (1985)

3. Petitioners Are Not Entitled to Qualified Immunity.

Finally, petitioners argue that the actions of the officers are protected by qualified immunity. The issue, of course, is "whether the right that was transgressed was 'clearly established' – that is, 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Groh,* 124 S.Ct. at 1293 (citations omitted). As described above, the law is clear that questioning which is unduly coercive or that lengthens the detention violates the Fourth Amendment. The law is also clear that questions to a

detainee seized on less than probable cause must relate to justifications for the seizure in the first place. Moreover, the law is clear: this Court has held that "the Fourth Amendment . . . forbids stopping or detaining persons for questions about their citizenship on less than a reasonable suspicion that they are aliens." *United States v. Brignoni-Ponce*, 422 U.S. at 884. This is exactly what occurred in this case and thus the officers properly were denied qualified immunity. As this Court explained, "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 557 U.S. 800, 818-19 (1982).

CONCLUSION

The judgment below should be affirmed.

Dated: November 3, 2004 Respectfully submitted,

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No. 03-1423

IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

The police did not violate the Fourth Amendment when, in the process of executing a lawful search for weapons at a suspected gang safe house, they detained respondent at gunpoint, then handcuffed her and three other able-bodied occupants for the duration of the search. In ruling otherwise, the Ninth Circuit ignored this Court's holding, in *Michigan* v. *Summers*, 452 U.S. 692 (1981), that officers executing a search warrant may "exercise unquestioned command of the situation," *id.* at 703, especially where, as in this case, that situation is inherently dangerous. Recognizing the weakness of the lower court's reasoning, respondent repeatedly attempts to divert attention from the fundamental facts that justified her detention. Thus, she advocates complete deference to the jury's legal conclusions, accuses petitioners of seeking a categorical rule permitting the handcuffing of all *Summers* detainees in all circumstances, and distorts the record in an effort to paint a picture of police misconduct. These attempts to confuse matters are unavailing. When basic Fourth Amendment principles are applied to the indisputable facts of this case, it is clear that the respondent's detention was objectively reasonable, and violated no clearly established rule of law.

The Ninth Circuit also erred in ruling that the police violated respondent's Fourth Amendment rights simply by asking about her immigration status. Respondent's attempt to shield this alternative holding from review is baseless. That holding is necessary to the lower court's judgment, and the fact that it rests on a theory that was never presented to the jury or briefed below is a reason to reverse that holding summarily, not to dismiss the second question presented.

If the Court chooses not to reverse summarily, the alternative holding cannot be sustained on the basis of the new theories respondent and her *amici* now offer. There is no

"subject matter" scope restriction for *Summers* detentions. Even if there were, questioning that does not communicate that a response is necessary to end the detention cannot expand the scope of a *Summers* detention, and the questioning of respondent did not convey such a message. Moreover, the police had ample grounds beyond respondent's ancestry and appearance to suspect her immigration status, and they had the legal authority to pose questions based on that suspicion. In all events, posing such questions in the circumstances of this case did not violate any clearly established rule of law.

I. THE MANNER IN WHICH RESPONDENT WAS DETAINED DID NOT VIOLATE THE FOURTH AMENDMENT.

Based on the facts that were indisputably known to the police at the time they executed the search warrant, it was plainly reasonable for them to detain respondent at gunpoint, and then to restrain her and three other, able-bodied occupants in handcuffs. Tacitly conceding this, respondent seeks to defend the judgment below by mischaracterizing the record, petitioners' arguments and the law. These diversionary efforts provide no basis for affirmance of that judgment.

A. Respondent's Detention Was Reasonable In Light Of The Potential Dangers The Officers Confronted.

Seeking to pretermit all meaningful review, respondent argues that this Court must adopt the jury's conclusion "that there was no factual justification for maintaining Ms. Mena in handcuffs for the entire duration of this search," and that the Court cannot accept any justifications for the detention that the jury rejected. Br. at 18. But this Court, not a jury, must decide the fundamental constitutional questions at issue in this case, which will bind courts and law enforcement officers nationwide. The Court should therefore determine, on a *de novo* basis, whether petitioners' conduct was objectively

reasonable. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996).

Attempting to divert attention from the specific facts that justified petitioners' conduct, respondent accuses petitioners of seeking "a new bright line rule allowing routine handcuffing and interrogation of *Summers* detainees." Br. at 13. Respondent then devotes much of her brief to attacking this sweeping, categorical rule. Far from claiming that officers can handcuff *Summers* detainees in all circumstances, however, petitioners claim only that officers may handcuff such detainees where, as was true here, potentially dangerous circumstances warrant such restraints.

In *Summers*, this Court found that two significant factors justified detention of those found on premises where search warrants are executed. First, the warrant itself creates "an easily identifiable and certain basis" for suspecting criminal activity. *Summers*, 452 U.S. at 704. Second, significant law enforcement interests, such as the interest in preventing flight and the interest in minimizing the risk of harm to officers and others, justify detentions that would allow officers to "exercise unquestioned command of the situation." *Id.* at 703. Based on these interests, this Court in *Summers* announced a general rule that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705 (footnote omitted).[1]

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[1] Contrary to respondent's repeated suggestion, Br. at 21, 23, *Summers* does not require officers to demonstrate the necessity of a detention in each case. Indeed, the court recognized that the general interest in "minimizing the risk of harm to the officers" supported the detention in that case even though "no special danger to the police [wa]s suggested by the evidence in this record." *Summers*, 452 U.S. at 702. Respondent's further claim that *Summers* did not approve "detention[s] without a showing of probable cause," Br. at 1, is likewise clearly wrong.

Implicit in *Summers*' authorization of detentions is an authorization for police "to use some degree of physical coercion or threat thereof" to effect those detentions. *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). The ability to use reasonable force is particularly critical because the execution of search warrants is so "inherently . . . perilous." *Ybarra* v. *Illinois*, 444 U.S. 85, 107 (1979) (Rehnquist, J., dissenting). Many officers have perished in the line of duty while executing warrants, to say nothing of the untold numbers who have been seriously injured. See Brief of the National League of Cities et al. at 10 n.2 (noting that at least seven officers were killed while executing warrants in 2001). Indeed, one purpose of *Summers* detentions is to alleviate the "risk of harm" and the possibility of "sudden violence" while search warrants are being executed. *Summers*, 452 U.S. at 702. It would be self-defeating to give officers the right to detain individuals for safety reasons while forbidding them from taking reasonable safety measures during those detentions. In *Summers* detentions, as elsewhere, the Fourth Amendment does not prevent officers from taking reasonable measures to protect themselves. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968).

In this case, the facts indisputably known to the police at the time they executed the search warrant made it entirely reasonable for them to detain respondent through an initial show of force, and thereafter to restrain her and three other able-bodied adults in handcuffs while they conducted their search. Resolving all genuine factual disputes in respondent's favor, the evidence showed the following: petitioners knew that the suspected perpetrator of at least two gang shootings lived at 1363 Patricia Avenue, and that at least one of his fellow gang members lived or had recently lived there.[2] They

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[2] While respondent claims that the police knew that only alleged gang member Raymond Romero resided at the home, Br. at 8, the officers knew that a phone number at the house was listed in the name of member Genaro Gonzalez. JA 221. Nor did the Romero family's "belief" that

knew that the address had been the site of at least two violent incidents and that occupants had resisted police intervention. They discovered a group of four able-bodied occupants at the house, which created a much greater risk that the officers might lose control of the situation should one or more of the detainees resist. And, they had probable cause to believe that weapons used in gang-related shootings were on the premises, and in fact found multiple weapons, along with gang paraphernalia, during the search. In light of these facts, the decision to detain at gunpoint and handcuff all four occupants was well-founded and objectively reasonable.

Essentially conceding the propriety of her initial detention and restraint, respondent claims that the officers should have released her because they had no direct information that she was involved in criminal activity. Br. at 32. But the officers simply did not know who respondent was or what her connection with Romero or the other gang members might be. Her presence in a house where gang members lived, where police reasonably suspected weapons were hidden, and where weapons were actually discovered, gave the officers ample reason to be wary of her and the three other, able-bodied residents. An occupant's connection to premises subject to a search warrant is itself "an easily identifiable and certain basis for . . . suspicion of criminal activity." *Summers*, 452 U.S. at 703-04.

Similarly, respondent's suggestion that her apparent willingness to cooperate required her release is unavailing. The fact that she was cooperative did nothing to change the overall situation—one fraught with serious dangers.

Gonzalez had moved out dispel the strong possibility that he might still live there. *Id* at 219-20. Indeed, even if the officers had known that Gonzalez had moved, his recent residence there justified the suspicion that the home was a gang safe house. *See id* at 158. And the warrant itself refutes respondent's related claim, Br. at 35, that the warrant failed to identify any gang members other than Romero who may have lived at 1363 Patricia Avenue at the time of the search. *See* JA 219-21.

Petitioners had good reason to remain skeptical of seemingly cooperative occupants, for officers have been killed by suspects who feigned cooperation before attacking the police. See Br. of National League of Cities et al. at 14 n.3; see also *Summers*, 452 U.S. at 702 (noting risk of "sudden violence" when police execute search warrants). And, respondent fails to mention that during her detention the officers were recovering a small arsenal of weaponry from the bedrooms and common areas of the house, a discovery that would hardly dispel their legitimate concerns.

Respondent also contends "that petitioners had adequate personnel at their disposal to remove respondent's handcuffs," Br. at 8, and that the officers "essentially abandon[ed] the tactical plan." *Id.* at 35. But no evidence supports these conclusory claims. No witness testified that there were enough officers to secure the scene without the use of handcuffs. In fact, the total number of officers involved in the execution of the warrant is not an accurate reflection of the officers present at the scene at any one time, because the house was initially secured by the SWAT team alone, which left after securing the location. See JA 168. Nor was any evidence presented at trial that the tactical plan specified a time for occupants to be released. *Id.* at 147-48.[3]

Allowing police to protect themselves by handcuffing detainees in potentially dangerous circumstances does not permit the routine handcuffing "of children and the elderly or sick." Br. at 25. Respondent is a healthy adult who was detained along with three other healthy adults, all of whom were found at an address that was associated with gang members and was being searched for weapons used in a gang shooting. A ruling that the risks present in this case made

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[3] Even if "the officers failed to prepare the Field Identification Cards" for the occupants in accordance with the plan, Br. at 35 a claim Officer Brill disputed, JA 75 this fact has no bearing on the objective reasonableness of the handcuffing itself.

petitioners' use of handcuffs objectively reasonable would not render such use appropriate in the absence of such risks.[4]

Nor did the reasonable use of handcuffs in this case convert the detention into "the functional equivalent of an arrest" made without probable cause. *Id.* at 22. Neither *Dunaway* v. *New York*, 442 U.S. 200 (1979), nor any other case respondent cites stands for the proposition that use of handcuffs during a *Summers* detention is sufficient to create an arrest. If anything, *Dunaway* stands for the contrary proposition—that "trappings of a technical formal arrest" like handcuffs are matters of "form" that "must not be exalted over substance." *Id.* at 215 & n.17. Here, the substance of the police conduct was to use handcuffs to detain respondent and others in order to prevent harm, interference and flight—not to arrest anyone.[5] See *United States* v. *Newton*, 369 F.3d 659, 675 (2d Cir.) (detention in handcuffs during parole search was not a *de facto* arrest under Fourth Amendment), *cert. denied*, 125 S.Ct. 371 (2004).

Because the decision to detain and restrain respondent and the other occupants of the house was plainly reasonable, respondent embellishes and mischaracterizes the record in an effort to suggest that the totality of circumstances rendered her detention unreasonable. Not a single page of the transcript she cites, however, supports her repeated claims that the garage where she was held was "cold," "damp" or "dank." Br. at 2, 4, 9, 33-34. Similarly, her claim that she was taken outside in the "pouring" rain, *id.* at 2, 4, 34, is at odds with her own testimony that the rain was only "[m]edium." JA 103.

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[4] In fact, petitioner Muehler testified that he would have removed respondent's handcuffs if she had been "gravely disabled," "pregnant," "elderly," or had other "health concerns." JA 195.

[5] In all events, respondent expressly waived any claim that she had been arrested. *See* 6/15/01 Tr. 189; *Illinois* v. *McArthur*, 531 U.S. 326, 334 (2001).

More egregiously, respondent attempts to manufacture the claim that she was held in handcuffs for up to an hour after the search ended. See Br. at 2, 14. This claim rests on nothing more than her statement that she was held "like two to three hours." JA 192. This "evidence" cannot possibly sustain an inference that respondent was held in handcuffs for three hours, and thus a full hour after the search ended. Respondent's "guesstimate" concerning the length of her detention was inherently vague and entirely speculative.[6] More fundamentally, it contradicted her own prior testimony that she was held in the garage for two hours, *id.* at 116, a recollection that matched that of petitioners and that corresponded to the time-stamp on a videotape taken after the search, which showed that the search was over approximately two hours after it began. *Id.* at 74, 82-83, 156, 163. Indeed, these facts no doubt explain why the Ninth Circuit's decision was not based on any alleged post-search detention.[7]

Finally, respondent attempts to bolster her case with allegations that the officers detained her in handcuffs because of a supposed animus toward illegal aliens or as "payback" for some unspecified affront. Br. at 7 n.4. These allegations are both baseless and irrelevant. Tellingly, respondent cites no evidence substantiating this alleged improper motive.[8] Even if she could, the subjective intent of the officers does not affect the Fourth Amendment calculus; instead, the issue is "whether the officers' actions are *objectively* reasonable in

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[6] Respondent was not wearing a watch, and there was no clock in the garage. *See* JA 137-38.

[7] Respondent's assertion that Officer Brill "admitted" that she was not released until 10 to 15 minutes after the search ended, Br. at 9, is baseless. In fact, Officer Brill did not recall whether she had been held for this period after the search. *See* JA 75.

[8] Respondent implies that the officers characterized 1363 Patricia Avenue as a "poor house" because of hostility toward the residents. *See* Br. at 7 n.4. But the term "poor house" was used by Anthony Romero to describe 1363 Patricia Avenue. *See* JA 219.

light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397 (internal quotation marks omitted) (emphasis added). "[E]vil intentions," even if proven, "will not make a Fourth Amendment violation out of an objectively reasonable use of force." *Id.* Here, the historical facts confronted by the officers provided an objective justification for using handcuffs to restrain the detainees—whether the officers acted with good will or with ill will is legally irrelevant.

B. Petitioners Are Entitled To Qualified Immunity.

Even if this Court concludes that the manner in which respondent was detained violated her Fourth Amendment rights, petitioners are entitled to qualified immunity because there was no clearly established law that restraining *Summers* detainees in handcuffs was unconstitutional.[9] At the time petitioners acted, no court had suggested that their actions could violate the Constitution, a fact recognized by the Ninth Circuit itself. See *Meredith* v. *Erath*, 342 F.3d 1057, 1063 (9th Cir. 2003). Respondent points to only two cases which supposedly warned that handcuffing *Summers* detainees violated the Constitution. The first, *Franklin* v. *Foxworth*, 31 F.3d 873 (9th Cir. 1994), was a case about the "wanton[] and callous[]" abuse of a severely disabled man, not about the appropriateness of handcuffing able-bodied detainees. *Id.* at 878. Indeed, the *Franklin* court's focus was on the officers' inexplicable failure to give any sort of clothing or covering to the semi-nude plaintiff. See *id.* at 877. The court tellingly had no comment about the handcuffing of the plaintiff's two able-bodied companions, making it clear that the opinion was

[9] While she cites Supreme Court Rule 14.1(a), Br. at 36 n.23, respondent offers no substantive response to petitioners' showing, Ptrs. Br. at 36-37 n.9; *id.* at 26 n.8, that the questions of qualified immunity are "fairly subsumed" in the questions presented in the petition. Her citation to the United States' brief on this point is mystifying; the United States addresses the immunity issues on the assumption that they are subsumed. U.S. Br. at 22 n.7; *id.* at 29 n.13.

based upon the officers' overall callous treatment and not upon the use of handcuffs. See *id.* at 875. Respondent also points to *United States* v. *Taylor*, 716 F.2d 701, 707 (9th Cir. 1983), but that case is completely inapposite. The *Taylor* court found only that *Summers* did not apply to an individual detained "some distance" from a home while it was being searched—nothing in *Taylor* addresses the appropriateness of using handcuffs in a *Summers* detention. *Id.* And respondent's claim that *Summers* itself provided some kind of warning against handcuffing detainees is without merit. If anything, *Summers* clearly established that officers could act reasonably to "exercise unquestioned command of the situation." 452 U.S. at 703.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT RESPONDENT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED WHEN SHE WAS QUESTIONED ABOUT HER CITIZENSHIP.

The Ninth Circuit also held that respondent's Fourth Amendment rights were violated when she was asked about her immigration status. Contrary to respondent's claims, this holding is an independent basis for the judgment below and thus properly before this Court. Respondent's attempts to defend that alternative holding are unavailing.

A. The Constitutional Propriety Of Respondent's Questioning Is Properly Before This Court.

Rehashing arguments she offered unsuccessfully in opposing the petition for a writ of certiorari, respondent contends that the Ninth Circuit did not "hold that the questioning of Ms. Mena about her immigration status was by itself a seizure in violation of the Fourth Amendment," Br. at 41, and that, because the issue was never briefed below, this Court should not address it now. Br. at 40-41. Both arguments are flatly wrong.

First, the Ninth Circuit plainly did not treat the questioning of respondent as merely one of "many factors that rendered

the detention unreasonable." *Id.* at 41. Emphasizing its view "that the officers unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status" when they had "no reason . . . to be suspicious," the lower court held that, "*[o]n these facts alone*, . . . Mena has alleged a violation of a constitutional right." Pet. App. 10a (emphasis added). It likewise stated that "[t]he officers simply did not have the particularized reasonable suspicion the Fourth Amendment requires to justify (1) questioning Mena regarding her citizenship status or (2) searching her purse for immigration documentation without her consent. Therefore, *just on these facts alone*, we note that Mena alleges a Fourth Amendment violation." *Id.* at 14a (emphasis added).[10]

Indeed, because the validity of a *Summers* detention does not turn on a particularized showing of reasonable suspicion, the lower court's lengthy analysis of this issue, Pet. App. 10a-14a, makes clear that it viewed the questioning as a discrete Fourth Amendment event, and not just one of many factors bearing on the reasonableness of her detention. Accordingly, unlike respondent, the en banc dissenters plainly and correctly understood the panel to have held "that the inquiry into citizenship *by itself* violated a constitutional right, by unduly invading [respondent's] privacy." *Id.* at 26a (Kleinfeld, J., dissenting) (emphasis added); see also *id.* at 34a (Gould, J., dissenting) (disagreeing with the panel that there was a "violation of the Constitution in regard to the questions posed to Ms. Mena on her citizenship").

As respondent admits, the lower court rendered this ruling without the benefit of any briefing, and the jury instructions did not permit the jury to premise a verdict on the questioning

[10] Respondent does not dispute that her purse was covered by the search warrant and that the jury rejected her claim that the search was overbroad. *See* Ptrs. Br. at 16 n.4; U.S. Br. at 27 n.11. Thus, the lower court's statement on page 14a of its opinion, like its prior statement on page 10a, can only be understood as a conclusion that the questioning alone violated respondent's Fourth Amendment rights.

alone. Br. at 40-41. These facts, however, do not shield the lower court's ill-considered alternative holding from review. This Court reviews judgments, *Bowen* v. *American Hospital Ass'n*, 476 U.S. 610, 625 n.11 (1986) (plurality), and the judgment below rests on the alternative holding that the questioning violated respondent's Fourth Amendment rights. See *Union Pac. R.R.* v. *Mason City & Fort Dodge R.R.*, 199 U.S. 160, 166 (1905) (where an appellate court sustains a trial court decision on two grounds, "each is the judgment of the court, and of equal validity with the other"). Because respondent's detention was constitutionally proper, the judgment can be sustained only on the basis of the alternative ruling. Thus, unless this Court chooses to reverse that ruling outright on the ground that a verdict cannot be sustained on a theory never presented to the jury, *McCormick* v. *United States*, 500 U.S. 257, 270 n.8 (1991), it must address the validity of that ruling. Respondent's suggestion, Br. at 43, that the Court dismiss the writ as to the second question—and thereby leave intact a judgment that rests on an improperly rendered holding—is legally untenable.

Review of the Ninth Circuit's alternative holding in favor of respondent is not at all unfair to her. *Id.* at 42-43. She failed to argue that the questioning violated her constitutional rights. Accordingly, if the Court holds that questioning her did not violate her rights, then she has lost nothing to which she is entitled. Only if the Court were to allow that ruling to remain in place could there be any prejudice—and the prejudice would be to petitioners.

B. Respondent's Questioning Was Constitutionally Permissible.

The lower court plainly erred in concluding that the police violated respondent's Fourth Amendment rights by asking about her immigration status without reasonable suspicion. As petitioners and the United States have shown, police questioning is not a Fourth Amendment "search" or "seizure" that must be justified by reasonable suspicion. This is true

even if the person is unable, for reasons independent of the questioning itself, to move about freely or to avoid the police. Ptrs. Br. at 17-23; U.S. Br. at 23-27. Rather, police questioning is a discrete Fourth Amendment event only when it extends an otherwise permissible detention. The lower court's conclusion that the questioning in this case violated respondent's rights simply because the police lacked particularized reasonable suspicion that she was an illegal immigrant was thus wrong as a matter of law.

Tacitly conceding this, respondent and her *amici* offer alternative rationales for the lower court's alternative holding. They contend that where an individual is detained without probable cause, even questioning that does not prolong the detention must be related to the justification for the detention. Alternatively, respondent claims that the questioning here was coercive and lengthened the duration of her detention. None of these claims has merit.

1. The Fourth Amendment Is Not Implicated By Questions That Do Not Prolong A *Summers* Detention.

Citing cases involving *Terry*-type stops, not *Summers* detentions, respondent and *amicus* the National Association of Criminal Defense Lawyers ("NACDL") argue that "seizures made on less than probable cause must be limited in both duration and *scope*" to the purpose of such stops. Br. at 47; see also NACDL Br. at 10. In fact, any "scope" requirement for *Terry*-type stops is essentially derivative of the "durational" limit that governs such stops. When officers ask questions unrelated to the purpose of a *Terry* stop—for example, by asking about drugs during a border patrol stop—the detention is prolonged beyond the "brief[]" period needed to "investigate the circumstances that provoke[d] suspicion" of illegal activity. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975). As a practical matter, therefore, seizures

permitted without probable cause are governed by a temporal, or durational, limit.[11]

But even if *Terry* stops are subject to a "scope" limitation, the same is not true of *Summers* detentions. When police ask questions about matters unrelated to the suspicions that justify *Terry* stops, the purposes of such stops are, by definition, not being served. Questions about the presence of drugs, for example, do not serve the purpose of a stop to investigate suspicions of illegal immigration. But a *Summers* detention "is categorically different from" a *Terry* stop. 452 U.S. at 706-07 (Stewart, J., dissenting).

> [T]he requirement that the scope of the intrusion be reasonably related to its justification *does not provide a limiting principle* for circumscribing the detention. If the purpose of the detention is to help police make the search, the detention can be as long as the police find it necessary to . . . search.

Id. at 712 (Stewart, J. dissenting) (emphasis added).

Thus, in contrast to *Terry* stops, the underlying purposes of a *Summers* detention continue to be served even when police ask questions unrelated to the search. During such questioning, detainees remain unable to interfere with the search, harm the officers or other residents, or flee. Indeed, this difference between *Summers* and *Terry* detentions demonstrates that the rationale for a strict scope requirement—*i.e.*, concern over pretextual stops—has far less salience in *Summers* detentions. Because *Terry* stops are initiated by officers in the field, there is an inherent danger that some overzealous officers will invoke the authority to

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[11] A "scope" limitation for such detentions appears to be derived from *Terry* v. *Ohio*, 392 U.S. 1 (1968), which involved a seizure and a search, an activity more logically associated with a scope requirement. *See id.* at 19-20. Although *Brignoni-Ponce* refers to the "'scope'" of the "inquiry" in a border patrol stop, 422 U.S. at 881, inquiries unrelated to suspicions of illegal immigration would, as just noted, improperly prolong the stop.

detain an individual for one purpose when the real purpose of the detention is entirely different. *Summers* detentions, however, cannot be initiated unless a neutral magistrate issues a search warrant based on probable cause. This requirement, and the fact that *Summers* detentions are "not likely to be exploited by the officer or unduly prolonged . . . because the information the officers seek normally will be obtained through the search and not through the detention," *Summers*, 452 U.S. at 701, make pretextual *Summers* detentions highly unlikely.[12]

Thus, the fundamental interests the Fourth Amendment serves are not protected by artificial "scope" restrictions on *Summers* detentions. Unless it prolongs a detention, the questioning of a person who has already been seized cannot cause a new or additional "seizure" that implicates the Fourth Amendment.[13] By contrast, questioning that prolongs a detention can cause such a "seizure," by restraining a detainee's liberty beyond the period of time she would otherwise be detained.

Respondent's claim that the questioning here prolonged her detention, Br. at 46, is frivolous. The questioning itself was indisputably brief, JA 106, 138-39, and did not extend the length of a detention that the police were entitled to maintain for the duration of a search that took approximately two hours. Because the officer who questioned respondent was

[12] Indeed, the suggestion that petitioners prepared a lengthy affidavit for a search warrant, JA 209-22, then met daily for over a week to plan the search, *id.* at 54, 145-46, just so they could engage in "immigration control," NACDL Br. at 9, is fanciful—particularly since the officers could have posed the same questions to respondent simply by approaching her in front of her house. As Officer Muehler testified, the officers were executing a search warrant, not engaging in an "investigation." JA 165.

[13] As the government explains, where questions that do not prolong a detention are coercive, they may implicate the Due Process Clause's voluntariness standard, the Fifth Amendment's Self-Incrimination Clause, or, in some cases, the Sixth Amendment. U.S. Br. at 25-26.

guarding the detainees, *id.* at 162, the scant time he spent questioning her would not otherwise have been used to speed the search itself. Thus, the questioning in this case did not implicate respondent's Fourth Amendment rights.

2. Respondent's Questioning Was Not Coercive.

Even if the Court were to enforce a scope requirement for *Summers* detentions, questioning that is not "coercive"—*i.e.*, that does not tie a person's freedom to a response—does not expand the "scope" of a detention. In *Terry*, this Court stated that a search and a seizure not based on probable cause should be "reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 19-20. This Court has subsequently held, however, that no seizure occurs when police ask questions of an individual, even one who is not free to leave or to avoid the question, as long as the questioning is not "so intimidating as to demonstrate that a reasonable person would have believed he was *not free to leave if had not responded*," *INS* v. *Delgado*, 466 U.S. 210, 216 (1984) (emphasis added); see also *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991). Questioning that does not lead a reasonable person to conclude that she must respond to gain her freedom cannot broaden the "scope" of the interference occasioned by an otherwise lawful detention, because it adds no additional, constitutionally cognizable "interference" to that detention.

The questioning in this case does not meet that standard. While respondent was handcuffed, the fact that a person is unable, for reasons independent of the questioning itself, to leave does not automatically communicate to a reasonable person that she will not be freed unless she answers police questions. *Bostick*, 501 U.S. at 436; *Delgado*, 466 U.S. at 218. Nor did the other circumstances surrounding respondent's questioning communicate such a message.

The record shows (JA 106, 137-39) that respondent was questioned by a single officer, who did not touch her, "point

guns at [her] or otherwise threaten [her]." *Bostick*, 501 U.S. at 437. The questioning itself was very brief, was not preceded by any accusations, and was conducted in the presence of three housemates. JA 106, 138-39; cf. *Florida* v. *Royer*, 460 U.S. 491, 502-03 (1983) (plurality) (no consent where suspect was questioned alone with two officers who accused him of criminal acts). The questions themselves—about identity and citizenship—were not inherently threatening. See *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451, 2458 (2004) (identification request does not implicate the Fourth Amendment); *Delgado*, 466 U.S. at 220 (same with respect to questions about citizenship and immigration papers). And the questioning occurred in respondent's home, which minimized, rather than increased, its coerciveness. See *Summers*, 452 U.S. at 702 (detention at home involves "neither the inconvenience nor the indignity" of a compelled visit to the police station); cf. *Delgado*, 466 U.S. at 217 n.5 (when agents are lawfully admitted to otherwise non-public premises, "the same considerations attending contacts between the police and citizens in public places should apply").

Most critically, although respondent was not shown the warrant or told why she was being detained, Br. at 6, 45, she was never told that her freedom depended upon answering the questions. *Delgado*, 466 U.S. at 216. Nor did she claim that she harbored any such misgivings.[14] Where, as here, a detainee makes no attempt to show that she believed compliance with the officer's requests was necessary to gain her freedom, questioning during a lawful *Summers* detention should not be deemed unconstitutional simply because the detainee was handcuffed at the time. It would be particularly unfortunate in an era of heightened concern over terrorism to

[14] There is absolutely no support for respondent's purely speculative assertion that she "likely would have been arrested" had she not answered the questions. Br. at 46. In fact, a refusal to cooperate is not a basis for an arrest. *Bostick*, 501 U.S. at 437.

impose artificial restrictions on the ability of law enforcement officers to ascertain the immigration status of an individual who is otherwise lawfully detained.

3. The Officer Had Reasonable Suspicion To Ask Respondent About Her Immigration Status.

Even if the Court concludes that the police must have reasonable suspicion to ask a *Summers* detainee about her citizenship status, the officers had such a suspicion here. While petitioners have never suggested that respondent's Latino ancestry and accent were alone sufficient to create such a suspicion, this Court has held that those are relevant, if not dispositive, factors. *Brignoni-Ponce*, 422 U.S. at 886-87. The officers also knew that at least two members of a gang of predominantly illegal aliens lived or had lived at 1363 Patricia Avenue and, based on their knowledge of gangs, surmised that the residence may have been a gang safe house.

The officers' suspicion that respondent might be an illegal alien, therefore, was not based on her "mere propinquity to" others suspected of criminal activity. *Ybarra*, 444 U.S. at 91. Unlike Ybarra, respondent was not in a public establishment by sheer chance when it was raided. Rather, she was found asleep in a residence known to house illegal alien gang members; she was the same general age as those gang members; and she had the same ancestry and foreign accent as those members. These facts are sufficient to give rise to a reasonable suspicion that respondent might have been an associate of the gang, and thus an illegal alien herself.

Nor is it true, as the ACLU claims, that the officer could not act on that suspicion. The ACLU cites no case that holds that federal immigration laws bar state officers from even asking lawfully detained persons about their immigration status. In fact, the Tenth Circuit has squarely rejected the very *expressio unius* preemption argument the ACLU makes here with respect to 8 U.S.C. § 1252c. See *United States* v.

Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999).[15] And, as petitioners have shown (Ptrs. Br. at 25), Ninth Circuit authority (which the ACLU dismisses as outdated) and an opinion by the Department of Justice Office of Legal Counsel (which the ACLU simply ignores), confirm that state police do possess this modest authority—a position the United States has again endorsed in its brief in this case.[16] U.S. Br. at 26-27 n.10.

In all events, the lower court based its alternative holding on lack of reasonable suspicion, not lack of authority, see Pet. App. 13a n.15 (declining to decide latter issue). The former ruling is erroneous, and this Court need not reach out to sustain the alternative holding on a theory respondent never raised below. See, *e.g.*, *Reno* v. *Koray*, 515 U.S. 50, 55 n.2 (1995) (argument by *amicus* not properly before Court where not made by a party and not relied on by lower court).[17]

4. Petitioners Are Entitled To Qualified Immunity.

Finally, even if the Court concludes that the questioning violated respondent's Fourth Amendment rights, petitioners

[15] The ACLU misleadingly claims that the court upheld a state arrest that § 1252c authorized. ACLU Br. at 18 n.10. In fact, the court agreed that § 1252c did not authorize the arrest, but rejected the claim that the statute's specification of state authority to make certain arrests impliedly precluded them from making other immigration-related arrests. *Vasquez-Alvarez*, 179 F.3d at 1296-1300.

[16] Indeed, whether or not the officers possessed statutory authority to arrest has no effect at all on the Fourth Amendment question of whether they had reasonable suspicion. *Cf. United States* v. *Di Re*, 332 U.S. 581, 584 n.4 (1948).

[17] Contrary to the claims of *amici* National Latino Officers Ass'n, *et al.*, Br. at 5-6, recognizing the authority of state police to question those reasonably suspected of being illegal aliens will not ineluctably harm local police efforts. State officers are not required to undertake such investigations, and can decline to do so for the very reasons *amici* advocate.

are entitled to qualified immunity. While *Brignoni-Ponce* requires reasonable suspicion to *stop* someone to investigate an immigration violation, it says nothing about the propriety of questioning one already lawfully detained. Contrary to respondent's claim (Br. at 50), moreover, it was not settled that questions posed to *Summers* detainees must relate to the purpose of the seizure; indeed, she cites no authority applying a scope restriction to *Summers* detentions, which are "categorically different from" *Terry* stops, and which three Justices have said are *not* subject to such a restriction. *Summers*, 452 U.S. at 706-07, 712 (Stewart, J., dissenting). Nor does she cite any case that gave "fair warning" that the brief questioning of an already lawfully detained person could be deemed sufficiently "coercive" to give rise to an additional "seizure" that must be justified by reasonable suspicion.

The lower court's qualified immunity ruling suffers from yet another infirmity. Even if the questioning required reasonable suspicion of an immigration offense, no case gave fair warning that police searching a home known to house illegal alien gang members could not form such a suspicion about a woman who was asleep in that home, and was the same general age and had the same ancestry and foreign accent as such gang members. While a case need not involve identical facts in order to provide fair warning, the lower court here simply presumed a violation of *Brignoni-Ponce*, see Pet. App. 13a, when the relevant facts were materially different.

CONCLUSION

For the foregoing reasons, and those stated in petitioners' opening brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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No. 03-1423

In the Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL, PETITIONERS

v.

IRIS MENA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits police officers, incident to execution of a valid warrant to search a residence for deadly weapons, to seize an occupant with force and detain her in restraints during the search.

2. Whether the Fourth Amendment permits officers, incident to execution of a valid search warrant, to question an otherwise lawfully detained occupant while the search is ongoing.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the issue whether police officers, incident to execution of a valid warrant to search a residence for deadly weapons, may seize an occupant with force and detain her in restraints during the search. It also presents the issue whether officers, consistent with the Fourth Amendment, may question an otherwise lawfully detained occupant while the search is ongoing. The Court's resolution of those issues will have significant implications for the conduct of federal law enforcement officers in executing search warrants. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. On January 13, 1998, petitioners, two officers assigned to the gang unit of the Simi Valley, California, police department, were dispatched to investigate a drive-by shooting. Petitioners later linked the shooting to a previous shooting involving two rival gangs, the West Side Locos gang and the Varrio Simi Valley gang. They determined that Raymond Romero, a member of the West Side Locos gang, was a primary suspect in both shootings, and that he likely possessed a gun used in the shootings. J.A. 43-44, 211-222; Pet. App. 56a.

After learning that Romero was living at 1363 Patricia Avenue in Simi Valley, petitioners sought and obtained a search warrant for that address. The warrant authorized police to search the house, the surrounding grounds, and any nearby vehicles belonging to the residents. Located on the surrounding grounds were a motorhome, a camper, a shed, a van, a boat, and two trucks. Among other things, police were authorized to search for deadly weapons, evidence of gang membership, items of identification, and any other stolen property. J.A. 205-211, 245; Pet. App. 57a-58a.

Around 7 a.m. on February 3, 1998, a team of officers, overseen by petitioners, executed the search warrant. Because the officers were investigating a violent crime, believed that gang members were living in the house, and had encountered resistance on previous visits to investigate violent crimes there, they decided to use a Special Weapons and Tactics (SWAT) team to secure the house. The SWAT team broke down the front door and entered. One or two members of the SWAT team entered a bedroom and found respondent, an 18-year-old woman, apparently asleep. The officers roused her at gunpoint, turned her face down, and handcuffed her.

J.A. 44-51, 54, 61, 78-80, 94-95, 173-174; Pet. App. 58a-59a.

Respondent and three other occupants of the house were brought to the garage, which had been converted into a bedroom. The police then began to search the house. The four occupants were held in the room in handcuffs during the search, which, according to respondent, lasted approximately two to three hours. For most of the search, one or two officers guarded the occupants. Respondent initially sat on one of the beds in the room, then moved to another bed. She was wearing a long-sleeved shirt and sweatpants, and later was given a jacket and shoes. At one point, she asked why she had been handcuffed, and requested that her handcuffs be removed; she did not complain, however, that the handcuffs were too tight. J.A. 83, 90, 105, 106, 108, 136-137, 139, 191-192; Pet. App. 29a, 59a.

Because the West Side Locos gang was predominantly composed of illegal immigrants, police had asked an agent from the Immigration and Naturalization Service (INS) to be present at the scene. While the search was ongoing, a police officer asked respondent, a legal alien, for her name, date of birth, and immigration status. The officer, in turn, summoned the INS agent, who came into the room, identified himself, and asked respondent for her immigration papers. When respondent said that her papers were in her purse, a police officer retrieved the purse, removed the papers, and gave them to the INS agent. At the end of the search, respondent was brought into the living room, released from her handcuffs, and told why she had been detained. During the search, police found a gun; bullets of the caliber used in one of the shootings; newspaper articles about the shootings; two baseball bats with

gang markings; and a small bag of marijuana. J.A. 82, 106-107, 122, 138-139, 159-160; Pet. App. 25a-26a.

2. Respondent brought suit against petitioners under 42 U.S.C. 1983, alleging, *inter alia*, that petitioners had violated her Fourth Amendment rights by searching the entire house and by detaining her for an unreasonable time and in an unreasonable manner. J.A. 16-25.[1] Petitioners moved for summary judgment, arguing both that they had not violated respondent's constitutional rights and that they were entitled to qualified immunity for any constitutional violation that had occurred. Pet. App. 59a-60a. The district court denied petitioners' motion, and the court of appeals affirmed in relevant part. *Id.* at 55a-72a.

The court of appeals first held that a triable issue existed as to whether the search of the house was overbroad because the officers should have realized that the house contained multiple residences. Pet. App. 64a-66a. Regarding respondent's detention, the court reasoned that, "if the jury here should conclude that the officers did have probable cause to search the entire premises * * * then the lawful authority to detain [respondent] would continue—and a reasonable officer could so conclude on these facts." *Id.* at 70a. On the other hand, "if the jury should conclude that the officers did not have probable cause to search [the entire house], then [respondent's] detention rests on a different footing and may be justified only in connection

[1] Respondent and her father, the owner of the house, also brought suit on a variety of claims against the City of Simi Valley and 16 other police officers, and on other claims against petitioners. J.A. 16-25. The lower courts dismissed or rejected all of those claims.

with whatever search the jury concludes to have been 'proper.'" *Ibid.*

3. At trial, a jury rejected the claim that the search of the entire house was overbroad because the officers should have realized that the house contained multiple residences. Pet. App. 50a. The jury found, however, that petitioners violated respondent's Fourth Amendment rights by "detaining her with force greater than that which was reasonable under the circumstances" and by "detaining her for a longer period than reasonable." *Id.* at 51a. The jury awarded $10,000 in general damages and $20,000 in punitive damages, plus attorney's fees, against each petitioner. *Id.* at 51a-53a. Petitioners filed post-trial motions contending, *inter alia*, (i) that, in the wake of this Court's intervening decision in *Saucier* v. *Katz*, 533 U.S. 194 (2001), the district court had erroneously conflated the two steps of the qualified-immunity analysis, and (ii) that the court had incorrectly instructed the jury on the unlawful-detention claim. The district court denied petitioners' motions. Pet. App. 35a-47a.

4. The court of appeals affirmed. Pet. App. 1a-22a.

a. As relevant here, the court of appeals first held that the officers violated respondent's Fourth Amendment rights. Pet. App. 6a-14a. Although the court acknowledged that the officers were investigating a serious crime, *id.* at 8a, it concluded that, "[b]y any standard of reasonableness, in light of the fact that [respondent] was not a suspect in the crime, the officers should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest," *id.* at 9a. The court added that, "because [respondent] was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while de-

taining persons suspected of being violent criminals." *Ibid.* Although the court recognized that police officers are often required to make split-second decisions in executing warrants, the court concluded that "it strains reason to justify the necessity—in these factual circumstances—of pointing a machine gun at [respondent's] face, roughly jerking her off of her bed, marching her barefoot through the rain into a cold garage, and keeping her in handcuffs for several hours." *Id.* at 10a.

The court of appeals alternatively held that the officers had "unduly invaded [respondent's] privacy" by inquiring about her immigration status. Pet. App. 10a. "On these facts alone," the court continued, "[respondent] has alleged a violation of a constitutional right." *Ibid.* Relying on this Court's decision in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the court reasoned that the officers lacked particularized reasonable suspicion to justify questioning respondent about her immigration status or searching for her immigration papers. Pet. App. 14a. The court concluded that, "[a]lthough the officers did not confront [respondent] in the context of a traffic stop, as the officers did in *Brignoni-Ponce*, the facts of this case sit within the ambit of the Supreme Court's decision in that case." *Ibid.*

b. Finally, the court of appeals held that petitioners were not entitled to qualified immunity because, in its view, the rights in question were clearly established. Pet. App. 14a-15a.

5. The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing en banc. Pet. App. 23a-34a.

a. Judge Kleinfeld, joined by five other judges, dissented from the denial of rehearing en banc. Pet.

App. 25a-32a. Judge Kleinfeld stated that "[t]he panel creates the extraordinary new proposition of law that it is unconstitutional to ask a person detained for other reasons about her citizenship, without reasonable suspicion." *Id.* at 26a. He distinguished *Brignoni-Ponce* on the ground that "[t]he gravamen of the interference with individual liberty [in *Brignoni-Ponce*] was the stop, not the questioning." *Id.* at 28a. As for the detention, Judge Kleinfeld reasoned that the panel's decision was inconsistent with this Court's decision in *Michigan* v. *Summers*, 452 U.S. 692 (1981), which held that a warrant to search for contraband carried with it the authority to detain occupants during the search except in an "unusual case." Pet. App. 29a-32a. If this case qualified as "unusual," he contended, "the holding of *Summers* is deprived of any force." *Id.* at 32a.

b. Judge Gould, joined by two other judges, also dissented. Pet. App. 33a-34a. He would have held that "a question is not a seizure." *Id.* at 33a. Even if the questioning implicated the Fourth Amendment, however, Judge Gould asserted that the officers had a reasonable basis to ask respondent about her citizenship, since she was found in a house occupied by members of a gang known to be composed largely of illegal immigrants. *Ibid.* Regarding the detention, Judge Gould reasoned that "we should not say that the Constitution precludes ensuring that any person found in potential proximity to weapons is restrained from finding and using a gun on the police." *Ibid.* "Law enforcement must confront certain unavoidable dangers," he concluded, "but the Constitution does not require that they face avoidable ones." *Ibid.* (footnote omitted).

SUMMARY OF ARGUMENT

Respondent's detention incident to the execution of a valid search warrant, and the questioning that occurred during that detention, were reasonable under the Fourth Amendment.

I. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), this Court held that officers executing a warrant to search for contraband may detain the occupants of the premises while the search is conducted. That rule is supported by compelling law enforcement interests: the interest in preventing flight in the event that incriminating evidence is found; the interest in protecting officer safety and preventing the destruction of evidence; and the interest in facilitating the orderly completion of the search. Although the Court suggested that a detention pursuant to *Summers* could be invalid in unusual cases involving special circumstances or a prolonged detention, neither the duration nor the manner of the detention here raises any constitutional difficulty. The duration of respondent's detention was reasonable, especially given the breadth of the search warrant being executed. Moreover, because the execution of a warrant to search for deadly weapons that had been used in gang-related drive-by shootings presented an unusually high degree of risk, the officers were justified in detaining respondent at gunpoint, and restraining her in handcuffs, for the duration of the search.

II. The fact that officers briefly questioned respondent during her detention does not raise Fourth Amendment concerns. This Court has repeatedly held that mere police questioning does not constitute a seizure. The court of appeals therefore erred by holding that an officer must have an independent justification,

in the form of reasonable suspicion, before questioning an individual who has been lawfully detained. Such a requirement would radically reshape this Court's Fourth Amendment jurisprudence. Instead, where an officer is detaining an individual incident to the execution of a search warrant, and where the questioning does not prolong the detention, no Fourth Amendment violation occurs. In this case, it is clear that the officers' questioning of respondent did not prolong her detention. Accordingly, the questioning and detention of respondent were consistent with the Fourth Amendment.

ARGUMENT

I. RESPONDENT'S DETENTION INCIDENT TO THE EXECUTION OF A SEARCH WARRANT WAS VALID UNDER THE FOURTH AMENDMENT

The Fourth Amendment to the Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. "[A] person has been 'seized' within the meaning of the Fourth Amendment," in turn, "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *California* v. *Hodari D.*, 499 U.S. 621, 627-628 (1991) (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). Because respondent's seizure was reasonable, it did not violate the Fourth Amendment.

A. Under *Michigan* v. *Summers*, Police Officers May Detain The Occupant Of A Residence, Incident To The Execution Of A Valid Warrant To Search The Residence For Contraband, Except In "Unusual Cases"

1. In *Michigan* v. *Summers*, 452 U.S. 692 (1981), police officers encountered an individual leaving a house as they were preparing to execute a warrant to search the house for narcotics, and detained him inside for the duration of the search. The Court upheld the detention. *Id.* at 705. At the outset, the Court reiterated the "general rule" that the seizure of a person ordinarily must be supported by probable cause. *Id.* at 696. The Court recognized, however, that "some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause." *Id.* at 699.

The Court then weighed "the character of the official intrusion and its justification" in the case of a detention incident to execution of a warrant to search for contraband. 452 U.S. at 701. Concerning the intrusion, the Court noted that the officers' acquisition of the warrant was "[o]f prime importance." *Ibid.* The Court observed that "[a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there." *Ibid.* Therefore, "[t]he detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself." *Ibid.* And because the information being sought by the officers

would normally be obtained through the search, rather than through detention incident to the search, the Court stated that such detention "is not likely to be exploited by the officer or unduly prolonged in order to gain more information." *Ibid.* Finally, the Court noted that, because the detention would occur inside the home, "it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Id.* at 702.

Having concluded that the intrusion resulting from a detention was slight, the Court proceeded to find that the justifications for a detention were substantial. 452 U.S. at 702-703. "Most obvious," the Court noted, "is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." *Id.* at 702. "Less obvious, but sometimes of greater importance," the Court added, "is the interest in minimizing the risk of harm to the officers." *Ibid.* The Court observed that "the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Ibid.* Therefore, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703. In addition, "the orderly completion of the search may be facilitated if the occupants of the premises are present," since the occupants could assist the police by opening locked doors or containers. *Id.* at 703.

The Court also considered the role of the search warrant in "provid[ing] an objective justification for the detention." 452 U.S. at 703. The Court reasoned that, when a search warrant for contraband has been issued, "[a] judicial officer has determined that police have

probable cause to believe that someone in the home is committing a crime." *Ibid.* Thus, "[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id.* at 703-704.

Accordingly, this Court held in *Summers* that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705 (footnote omitted). In a footnote, the Court stressed that "[t]he rule we adopt today does not depend upon * * * an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.* at 705 n.19. In another footnote, however, the Court acknowledged that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." *Id.* at 705 n.21.

2. In the nearly quarter century since this Court's decision in *Summers*, the *Summers* rule has proven to be both prudent and workable. Professor LaFave has described *Summers* as the "most significant" of the cases in which this Court has "opted for a standardized procedure to avoid the necessity of case-by-case decisionmaking by police and courts," and has concluded that the rule of *Summers* "makes eminently good sense." 2 Wayne R. LaFave, *Search and Seizure* § 4.9(e) at 649, 651-652 (3d ed. 1996). And this Court has frequently relied on *Summers* in later Fourth Amendment decisions, without elaborating on, or even mentioning, *Summers*' footnote discussing the possibility of "unusual cases." See, *e.g.*, *Illinois* v. *McArthur*, 531 U.S. 326, 331 (2001); *Wilson* v. *Layne*, 526 U.S. 603, 611 (1999); *United States* v. *Place*, 462 U.S. 696, 703, 704 (1983).

B. Respondent's Detention Pursuant To *Summers* Was Valid

1. The officers' actions in this case fall squarely within the logic and holding of *Summers*. The officers were executing a warrant to search for "[d]eadly weapons, specifically firearms including ammunition, * * * knives * * * and evidence of street gang membership." J.A. 210. The warrant was obtained as part of an investigation of a gang-related drive-by shooting, and the prime suspect was thought to live at the location to be searched. J.A. 43-44, 211-222; Pet. App. 56a. The potential for an outbreak of violence was significant enough for the officers to engage a SWAT team to execute the warrant. J.A. 50-51, 54, 61, 78-80, 173-174. Under those circumstances, *Summers* authorized a detention of all occupants of the dwelling to be searched in order to ensure the safety of the officers and all persons in the residence. "The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Summers*, 452 U.S. at 704. The fact that the officers had no specific reason to regard respondent as a suspect is irrelevant: the *Summers* rule "does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying the detention or the extent of the intrusion to be imposed by the seizure." *Id.* at 705 n.19.

Respondent's detention does not remotely present the type of "special circumstances" or "prolonged de-

tention," *Summers*, 452 U.S. at 705 n.21, that might take this case outside the *Summers* rule that a detention incident to the execution of a warrant to search for contraband is valid. Both the duration and the manner of the detention were reasonable. The duration of respondent's detention was not excessive—especially when measured against the breadth of the search warrant, which authorized the officers to search not only the house, but also the surrounding grounds and nearby vehicles, for a variety of items. J.A. 205-211. Nothing in the record suggests that the officers failed to carry out the search expeditiously. Likewise, the manner of the detention was resonable. Although respondent was detained in handcuffs for the duration of the search, respondent did not complain that her handcuffs were too tight. J.A. 105, 139. Respondent was able to move around the room during the detention. J.A. 108, 136-137. And respondent was fully dressed at the time of the initial seizure, and was provided with additional clothing during the course of the detention. J.A. 106; Pet. App. 29a.

2. In concluding that the officers' conduct violated the Fourth Amendment, the court of appeals relied primarily on two facts: (i) that respondent was seized at gunpoint, and (ii) that respondent was held in handcuffs for the duration of the search. Pet. App. 9a. In emphasizing these two facts, however, the court of appeals did not cite this Court's decision in *Summers*, but instead evaluated respondent's claim under the more general "objective reasonableness" standard applicable to excessive-force claims. *Id.* at 6a-14a; see *Graham* v. *Connor*, 490 U.S. 386, 397 (1989).[2]

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[2] In *Graham*, the Court held that "*all* claims that law enforcement officers have used excessive force * * * in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." 490 U.S. at 395.

The use of force, by itself, to effectuate a *Summers* detention does not trigger constitutional concern. *Summers* expressly authorizes officers to *detain* an occupant of the place to be searched, and that authorization necessarily entails the ability to use force to do so. Cf. *Graham*, 490 U.S. at 396 (noting that "the right to make an arrest or investigative stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it"). Officers are not required to rely on an occupant's good faith or passive acquiescence in a direction to remain on the premises. Indeed, one of the justifications for a *Summers* detention is to avoid the risk that an occupant will flee if the search reveals evidence linking the occupant to criminal activity. 452 U.S. at 702. Nor are police officers required to take the chance that an apparently harmless suspect can safely be left unrestrained. Rather, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703. Thus, the actions of the court of appeals emphasized—the drawing of guns and the use of restraints—cannot constitute "special circumstances" under *Summers* or amount to "excessive force" under *Graham*.[3]

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[3] This Court has not clarified the relationship between the "special circumstances" mentioned in *Summers* and the test for excessive force later announced in *Graham*. The clearest analytical approach would be to use *Summers* to evaluate the claim that, in light of unusual circumstances, *any* detention of a particular occupant of a dwelling to be searched was impermissible. The *Graham* test, in contrast, would bear on whether the *manner* of an otherwise permissible detention during execution of a warrant involves

When the occupant of a house searched pursuant to a valid warrant claims that the manner of her detention violated the Fourth Amendment because officers used excessive force, the analysis must take into account the law enforcement exigencies in executing a search warrant and the Court's admonition in *Summers* that officers are not required to make ad hoc, case-specific determinations about the degree of risk that a particular individual may pose. Because the facts on which the court of appeals relied do not render the officers' conduct here objectively unreasonable, the court of appeals erred by concluding that the manner of respondent's detention was invalid.

a. The court of appeals first asserted that the officers should not have seized respondent at gunpoint. Pet. App. 9a. The officers' decision to do so in this case, however, was entirely reasonable. Because the officers were investigating a violent crime, believed that gang members were living at the house, and had encountered resistance on previous visits to investigate violent crimes there, the officers concluded that execution of the search warrant involved an unusually high degree of risk, and therefore decided to employ a SWAT team. J.A. 50-51, 54, 61, 78-80, 173-174. The SWAT team's decision to seize respondent at gunpoint—and its decision initially to restrain her—constitutes precisely the type of judgment, "in circumstances that are tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at

excessive force. Under that dichotomy, it would appear that respondent challenges the *manner* of her detention, not whether she could be detained at all. But regardless of which test is applied, the holding of this Court in *Summers* that officers should generally be able to detain occupants of a house should inform the reasonableness analysis.

397, to which this Court has traditionally afforded deference.[4]

b. The court of appeals did not suggest that the officers' decision *initially* to detain respondent in handcuffs was unreasonable, but instead asserted that the officers should have *released* respondent from her handcuffs at some point before the conclusion of the search. Pet. App. 9a. That claim is likewise unfounded.

In virtually all cases, the *Summers* test, together with the justifications that underlie it, supports routine measures by officers to reduce the risks posed by unknown persons detained during a search: most notably, the risk that occupants will endanger the safety of officers if they are left unrestrained. Accomplishing that aim will often require physical restraints. Officers should not be required during the execution of a search warrant to divert resources from the task at hand in order to make a difficult predictive judgment about whether a particular occupant can be released from restraints. Accordingly, lower courts have routinely upheld the use of handcuffs in *Summers* detentions.[5]

[4] The court of appeals also suggested that the officers acted improperly in "roughly jerking [respondent] off of her bed" and "marching her barefoot through the rain into a cold garage." Pet. App. 10a. The officers, however, appear to have used only a minimal degree of force in moving respondent from her bed to the converted garage, J.A. 102, and the distance from the back door of the house to the converted garage (which was attached to the house) was not great, J.A. 103, 244-245.

[5] See, *e.g.*, *Torres* v. *United States*, 200 F.3d 179, 186-187 (3d Cir. 1999); *United States* v. *Fullwood*, 86 F.3d 27, 29-30 (2d Cir.), cert. denied, 519 U.S. 985 (1996); *United States* v. *Fountain*, 2 F.3d 656, 663-664 (6th Cir.), cert. denied, 510 U.S. 1014 (1993); *United States* v. *Guadarrama*, 128 F. Supp. 2d 1202, 1217-1219 (E.D. Wis. 2001); *Turner* v. *Sheriff of Marion County*, 94 F. Supp. 2d 966, 974 (S.D. Ind. 2000); *Crosby* v. *Hare*, 932 F. Supp. 490, 493 (W.D.N.Y.

Even if officers were to conclude, after a colloquy with the detained occupant, that the occupant would likely pose no threat to the safety of officers and would likely not interfere with the conduct of the search if released from handcuffs, officers could never be certain of that conclusion—especially given the very real possibility that an individual who appears to act in a compliant manner when handcuffed could react in a violent manner when freed. Officers would therefore be confronted with an unappealing choice: either to divert additional resources from the search for the purpose of supervising any uncuffed occupants, or to remove any uncuffed occupants from the house altogether, thereby reducing the risk that uncuffed occupants will endanger officers or destroy evidence but increasing the intrusiveness of (and undermining the justifications for) the detention in the first place. See *Summers*, 452 U.S. at 702, 703.

In light of the high-risk nature of any search for narcotics or weapons, see *Summers*, 452 U.S. at 702, and the particularly high-risk nature of this search, the officers' decision to detain respondent and the other occupants of the house in handcuffs for the duration of the search, in order to "exercise unquestioned command

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1996); *Howard* v. *Schoberle*, 907 F. Supp. 671, 677 (S.D.N.Y. 1995); *People* v. *Ornelas*, 937 P.2d 867, 870-871 (Colo. Ct. App. 1996); *Wilson* v. *State*, 547 So. 2d 215, 216-217 (Fla. Dist. Ct. App. 1989); *State* v. *Slater*, 994 P.2d 625, 632 (Idaho Ct. App. 1999); *Martin* v. *City of New Iberia*, 717 So. 2d 1153, 1153 (La. 1998); *People* v. *Zuccarini*, 431 N.W.2d 446, 448 (Mich. Ct. App. 1988); *State* v. *Schultz*, 491 N.E.2d 735, 737, 740 (Ohio Ct. App. 1985); *State* v. *Apalakis*, 797 A.2d 440, 445-446 (R.I. 2002); *State* v. *Banks*, 720 P.2d 1380, 1383 (Utah 1986); *State* v. *Vorburger*, 648 N.W.2d 829, 843-844 (Wis. 2002).

of the situation," *id.* at 703, was objectively reasonable, and therefore did not violate the Fourth Amendment.

3. The courts of appeals that have addressed the question have regularly upheld detentions incident to valid search warrants in cases with facts similar to the circumstances here. For example, in *Torres* v. *United States*, 200 F.3d 179 (3d Cir. 1999), federal agents executing a warrant to search for narcotics broke down the front door of a house, seized one of the occupants at gunpoint, and ordered him to lie on the floor, where they handcuffed him. *Id.* at 182. The occupant, dressed only in a towel, was placed on a couch in the living room and remained there in handcuffs for the duration of the search, which lasted between one and a half and three hours. *Ibid.* The Third Circuit held that the officers' conduct was lawful. *Id.* at 187.

Similarly, in *United States* v. *Fountain*, 2 F.3d 656 (6th Cir.), cert. denied, 510 U.S. 1014 (1993), federal officers executed a search warrant for firearms and narcotics at a house from which firearms and narcotics had previously been seized. *Id.* at 659. Upon entering the house, the agents conducted a protective sweep and brought the four occupants into the living room. *Ibid.* There, the agents ordered the four occupants to lie down on the floor, and frisked and handcuffed them. *Id.* at 659-660. The occupants remained handcuffed on the floor, face down, for up to 30 to 60 minutes while the search was completed. *Id.* at 660, 663. The Sixth Circuit upheld the detention. *Id.* at 663-664.

This case bears no resemblance to the rare instances in which courts of appeals have perceived constitutional problems in *Summers* detentions, finding that a detention was "unnecessarily painful, degrading, or prolonged," or "involve[d] an undue invasion of privacy." *Franklin* v. *Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994).

In *Franklin*, officers seized a bedridden occupant who was suffering from advanced multiple sclerosis. *Id.* at 874. The officers handcuffed him, carried him into the living room, and placed him on a couch. *Id.* at 875. The occupant was exposed from the waist down, and officers left him handcuffed for more than two hours. *Ibid.* The Ninth Circuit held that the detention was constitutionally invalid, and it remanded for a determination of whether the officers were entitled to qualified immunity. *Id.* at 878. The court reasoned that it was "not only the length of the detention but also the treatment afforded the detainee during the detention that offends constitutional principles." *Id.* at 877. It was undisputed that the officers were aware that the occupant could not walk or sit up unassisted. *Ibid.* It would therefore have been "apparent to a reasonable officer" that the occupant posed no serious threat to the officers or to the conduct of the search. *Ibid.* In addition, the officers failed to provide the occupant with clothing or covering before he was carried into the living room, with the result that "his genitals [were] exposed to the view of 23 armed strangers." *Ibid.* The court concluded that the detention "wantonly and callously subjected an obviously ill and incapacitated person to entirely unnecessary and unjustifiable degradation and suffering." *Id.* at 878.

In *Heitschmidt* v. *City of Houston*, 161 F.3d 834 (5th Cir. 1998), officers were executing a warrant to search for evidence of a prostitution ring. *Id.* at 835. Officers lured an occupant out of the house, pushed him against the trunk of a police car, and handcuffed him. *Ibid.* Officers then took the occupant back into the house and positioned him on a bar stool in the living room, where he remained for about four and a half hours while the house was being searched. *Id.* at 835-836. Although the

occupant complained that the handcuffs were painfully tight, his requests that they be loosened were denied. *Id.* at 836. The occupant's request to use the bathroom was also denied. *Ibid.* The Fifth Circuit reasoned that the nature and duration of the occupant's detention, as alleged, were unduly intrusive. *Id.* at 838.[6] The court concluded, on the basis of the pleadings, that the occupant had stated a claim not only that the detention was unlawful, but that the officers were not entitled to qualified immunity. *Id.* at 839.

This case falls at the other end of the spectrum. Respondent was not manifestly ill or injured. Her privacy was not unduly invaded beyond what was reasonably necessary to execute the warrant; instead, the officers furnished her with additional clothing and shoes. Respondent never complained of being in pain or acute discomfort. And the duration of the search was unexceptional. On those facts, it would seriously erode the clarity of the objective *Summers* rule to hold

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[6] The Fifth Circuit also observed that the warrant at issue authorized the officers to search only for evidence and not for contraband. 161 F.3d at 839; see *Leveto* v. *Lapina*, 258 F.3d 156, 168-172 (3d Cir. 2001) (noting that search warrant sought only evidence of tax evasion, but ultimately holding, under *Summers*, that an eight-hour detention was unduly prolonged). In *Summers*, the Court left open whether its holding would apply in a case in which "the search warrant merely authorized a search for evidence." 452 U.S. at 705 n.20. Respondent does not contend that the weapons for which the officers were searching constituted mere "evidence"—nor could she, in light of this Court's repeated assertions in the Fourth Amendment context that weapons are either a form of contraband, see, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1050 (1983), or of a piece with contraband, see, *e.g.*, *Payton* v. *New York*, 445 U.S. 573, 587-588 (1980).

that the officers violated respondent's constitutional rights.[7]

[7] Although the court of appeals held that petitioners lacked qualified immunity on respondent's constitutional claims, the questions presented in this Court explicitly are addressed to the substantive issue of whether petitioners' conduct violated respondent's constitutional rights. Pet. i. To the extent that the court of appeals' broader holding concerning qualified immunity is subsumed in those questions, see Pet. 13 n.3, 18-19 (challenging the court of appeals' denial of qualified immunity), the court of appeals further erred by holding that the right to be free from detentions of the type to which respondent was subject was clearly established at the time of the alleged violation. See *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Although *Graham* and *Summers* had been decided at the time of petitioners' conduct, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Of the lower-court decisions discussed above, only *Franklin* and *Fountain* had been decided at the time of petitioners' conduct. Because petitioners' conduct was not nearly as egregious as that in *Franklin*, and because the search in *Fountain* was upheld, it cannot be said that the right to be free from the conduct at issue was "clearly established" at the time. This case does not involve the kind of exceptional conduct that can give rise to a damages action despite novel factual circumstances. Cf. *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). Indeed, in subsequent cases involving more egregious conduct than this one, courts of appeals have held that, although the conduct is itself unlawful, the officers who engaged in it have qualified immunity. See, *e.g.*, *Williams* v. *Kaufman County*, 352 F.3d 994, 1011-1012 (5th Cir. 2003); *Leveto*, 258 F.3d at 172-174.

II. THE OFFICERS' QUESTIONING OF RESPONDENT DID NOT RENDER HER DETENTION INCIDENT TO THE EXECUTION OF A SEARCH WARRANT INVALID UNDER THE FOURTH AMENDMENT

In the alternative, the court of appeals held that the officers violated respondent's Fourth Amendment rights because they lacked reasonable suspicion to question respondent about her immigration status. Pet. App. 10a, 14a. That holding was erroneous. Because that questioning did not constitute a discrete seizure and did not render respondent's actual seizure unreasonable, no Fourth Amendment violation occurred.

A. Questioning Does Not Constitute A Discrete "Seizure" For Fourth Amendment Purposes

The court of appeals' holding was premised on the assumption that the officers were required to have reasonable suspicion in order to question respondent concerning her immigration status—which, in turn, was premised on the further assumption that questioning constitutes a discrete Fourth Amendment event. Both assumptions were mistaken.

1. This Court has "held repeatedly that mere police questioning does not constitute a seizure." *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); see *Hiibel* v. *Sixth Judicial Dist. Court of Nev.*, 124 S. Ct. 2451, 2458 (2004); *Illinois* v. *Lidster*, 124 S. Ct. 885, 890 (2004); *United States* v. *Drayton*, 536 U.S. 194, 200-201 (2002); *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam); *INS* v. *Delgado*, 466 U.S. 210, 216-217 (1984); *Florida* v. *Royer*, 460 U.S. 491, 497-498 (1983) (plurality opinion); *id.* at 523 n.3 (Rehnquist, J., dissenting); cf. *Mendenhall*, 446 U.S. at 551-557 (opinion of Stewart, J.). Where an officer simply "approaches an individual

and asks a few questions," *Bostick*, 501 U.S. at 434, the Court has consistently concluded that such contact constitutes "the sort of consensual encounter that implicates no Fourth Amendment interest," *Rodriguez*, 469 U.S. at 5-6. As long as the individual being questioned remains "free to disregard the questions and walk away," an officer may question the individual even absent reasonable suspicion. *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.).[8]

2. Respondent obviously was not free to walk away. But because questioning does not constitute a discrete Fourth Amendment event, it follows that an officer need not have an independent justification, in the form of reasonable suspicion, before questioning an individual who has been lawfully detained. In reaching the contrary conclusion, the court of appeals relied primarily on this Court's decision in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). That reliance was misplaced. In *Brignoni-Ponce*, the Court considered only whether the Border Patrol had the "authority to *stop* automobiles in areas near the Mexican border," so that officers could question the occupants about their immigration status. *Id.* at 874 (emphasis added). The Court ultimately held that stops by roving patrols near the border "may be justified on facts that do not amount to the probable cause required for an arrest."

[8] Although this Court's decisions in cases such as *Hiibel*, *Bostick*, *Rodriguez*, *Delgado*, and *Royer* hold only that questioning, by itself, cannot constitute a Fourth Amendment "seizure," their reasoning equally compels the conclusion that questioning cannot constitute a Fourth Amendment "search." A "search" occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States* v. *Jacobsen*, 466 U.S. 109, 112 (1984). No invasion of privacy occurs when an officer asks a question that an individual is under no obligation to answer.

Id. at 880. The Court in no way suggested that reasonable suspicion was independently necessary for the questioning that followed the initial stop, as opposed to the stop itself. Indeed, the Court has made clear that, when a stop is justified without individualized suspicion, at a fixed immigration checkpoint, individualized suspicion is not independently required in order for the authorities to ask questions of the persons so seized. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 562 (1976). As Judge Kleinfeld noted in his opinion dissenting from the denial of rehearing, therefore, "[t]he gravamen of the interference with individual liberty [in *Brignoni-Ponce*] was the stop, not the questioning." Pet. App. 28a.[9]

3. If taken to its logical conclusion, the court of appeals' apparent holding that questioning constitutes a discrete Fourth Amendment event necessitating an independent justification would require courts to engage in excessive "second-guessing" and "*post hoc* evaluation of police conduct," *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985), in order to determine whether any given line of questioning in an interrogation was sufficiently justified. A difficult and refined inquiry to determine whether each particular question was sufficiently related to the initial justification for a stop is not needed to satisfy the Fourth Amendment's objective reasonableness requirement. It would also inject Fourth Amendment standards designed for discrete

[9] The court of appeals also relied on its earlier decision in *United States* v. *Montero-Camargo*, 208 F.3d 1122 (9th Cir.) (en banc), cert. denied, 531 U.S. 889 (2000). Pet. App. 11a-12a. As in *Brignoni-Ponce*, however, the court in *Montero-Camargo* considered only whether Border Patrol agents had "reasonable suspicion to *stop*" two cars near a border checkpoint. 208 F.3d at 1126 (emphasis added).

purposes into the evaluation of custodial interrogation, instead of leaving review of such questioning to the Due Process Clause's voluntariness standard, the Fifth Amendment's Self-Incrimination Clause, or in some cases, the Sixth Amendment. See, *e.g.*, *Fellers* v. *United States*, 124 S. Ct. 1019, 1022-1023 (2004); *Dickerson* v. *United States*, 530 U.S. 428 (2000). And even if the court of appeals' holding could somehow be confined to the immigration context, as the court of appeals may have intended (see Pet. App. 10a-15a), it would hamper the ability of government officials to elicit voluntary responses from individuals about their immigration status.[10] Thus, a rule that questions

[10] The court of appeals stated in passing that "it is doubtful that the police officer [who questioned respondent] had any authority to question [her] regarding her citizenship." Pet. App. 13a n.15. The statutes cited by the court, however, stand only for the propositions that a local law enforcement agency may enter into an agreement with the federal government to perform the functions of federal immigration officers, see 8 U.S.C. 1357(g), and that a local law enforcement agency must obtain confirmation from federal officials before detaining certain illegal aliens, see 8 U.S.C. 1252c(a). Those statutes, by their terms, do not foreclose a local police officer from merely *asking* about an individual's immigration status. To the contrary, one of those statutes allows local law enforcement officials "to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States," and "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. 1357(g)(10).

The court of appeals also suggested that "[a]gents of the INS have limited authority to question and detain an individual suspected of being an illegal alien, so long as they have a particularized reasonable suspicion that the individual is in fact an illegal alien." Pet. App. 13a n.15. But the statutory provision on

constitute "seizures" for Fourth Amendment purposes "would have neither the text of the Constitution behind it nor any logical basis under it." *United States* v. *Childs*, 277 F.3d 947, 951 (7th Cir.) (en banc), cert. denied, 537 U.S. 829 (2002).[11]

B. The Officers' Questioning Did Not Render Respondent's Detention Invalid

The court of appeals suggested that, even if the officers' questioning of respondent did not constitute a discrete Fourth Amendment event, the questioning, when considered together with the other factors discussed above, rendered respondent's detention invalid. Pet. App. 14a. That suggestion lacks merit. Where, as here, questioning of an occupant detained incident to a search warrant does not prolong the duration of the occupant's detention, the detention should be sustained.

1. Even a seizure that is reasonable at its inception may be conducted in such a manner as to violate the Fourth Amendment. The Court has acknowledged that a detention incident to execution of a search warrant

which the court relied, 8 U.S.C. 1357(a)(1), authorizes federal immigration officials to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," and is more properly read to "confer[] upon the INS the authority to question aliens to the fullest extent permissible" under the Fourth Amendment. *Zepeda* v. *INS*, 753 F.2d 719, 725 (9th Cir. 1984).

[11] At one point, the court of appeals suggested that the officers also violated respondent's Fourth Amendment rights by searching her purse for her immigration papers. Pet. App. 14a. The jury, however, found only that respondent's seizure was unreasonable—not that respondent was the victim of an unreasonable search. *Id.* at 50a-51a. Even assuming that the search of respondent's purse was not consensual, respondent's immigration papers would appear to qualify as an "item[] of identification," and thus come within the ambit of the search warrant. J.A. 211.

will generally be "longer than the momentary" detention authorized when an officer has reasonable suspicion to believe that an individual is engaging in criminal activity. *Place*, 462 U.S. at 709; cf. *Summers*, 452 U.S. at 711 & n.3 (Stewart, J., dissenting) (noting that a detention incident to execution of a search warrant could last for several hours). Such a seizure, however, must be tied to its initial justification: the safe and efficient execution of the search warrant. Accordingly, officers cannot significantly prolong a detention authorized by *Summers* solely to conduct independent questioning of the detained individual. Indeed, the Court in *Summers* noted that officers would be unlikely to engage in detentions that are "unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." 452 U.S. at 701.[12]

2. In this case, the officers' questioning of respondent did not extend the duration of her detention. The police officer who initially questioned respondent asked her only for her name, date of birth, and immigration status, and the INS agent who subsequently questioned her asked her only for her immigration papers. J.A. 106-107, 138-139; Pet. App. 25a-26a. That limited questioning took place while officers were diligently carrying out the search, and it was related (if indirectly) to the purpose of the underlying investigation. Respondent's brief and routine "interrogation"—"if it can even be called that," *Martinez-Camargo* v. *INS*, 282 F.3d

[12] Nothing would prevent officers, however, from conducting investigatory questioning of an individual even if it did prolong the *Summers* detention if the officers had reasonable suspicion focused on that individual or if the individual desired to cooperate.

487, 493 (7th Cir. 2002)—therefore did not even arguably call the validity of her detention into question. Respondent's questioning, and her underlying detention, were thus consistent with the Fourth Amendment.[13]

[13] To the extent that the court of appeals' holding that petitioners lacked qualified immunity on respondent's constitutional claims is properly before this Court, see p. 21, note 7, *supra*, the court of appeals also erred by holding that the right to be free from detentions involving questioning was clearly established at the time of the alleged violation. No court of appeals had addressed, and no other court of appeals has since addressed, the specific issue whether questioning renders a detention under *Summers* invalid. Although a number of courts of appeals, including the Ninth Circuit, have addressed the distinct issue whether questioning concerning unrelated subjects renders *traffic stops* unreasonable, those decisions, both before and after the conduct at issue here, have reached differing results. See, *e.g.*, *Childs*, 277 F.3d at 950-954 (upholding stop); *United States* v. *Shabazz*, 993 F.2d 431, 435-438 (5th Cir. 1993) (same); but see, *e.g.*, *United States* v. *Holt*, 264 F.3d 1215, 1228-1230 (10th Cir. 2001) (concluding that questioning on unrelated subjects can render stop unreasonable); *United States* v. *Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) (same), cert. denied, 514 U.S. 1134 (1995); *United States* v. *Perez*, 37 F.3d 510, 513 (9th Cir. 1994) (same). Even if those decisions controlled the issue presented here, petitioners are entitled to qualified immunity on the basis that, "[i]f judges * * * disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The Supreme Court of the United States

DARIN L. MUEHLER and ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a national, nonprofit, nonpartisan organization of more than 400,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. As part of this work, the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants. The American Civil Liberties Union Foundation of Southern California is a regional affiliate of the national ACLU.

STATEMENT OF THE CASE

Respondent Iris Mena, a lawfully present permanent resident, won a judgment by jury trial against Petitioner police officers under 42 U.S.C. 1983 for violation of her Fourth Amendment rights. The jury found that the officers subjected Respondent to an unreasonably lengthy detention that involved unreasonable force. The Ninth Circuit affirmed this judgment on two grounds. First, the court found that the length and manner of the detention rendered it unreasonable. Second, the court found that Petitioners' decision to interrogate Respondent about her immigration status without particularized suspicion also rendered the detention unreasonable. Petitioners' Appendix to the Petition For A Writ of Certiorari ("Pet. App.") at

[1] This brief was not authored in any part by counsel for either party. No person or entity other than *amici curiae* and its counsel made any monetary contribution to the submission of this brief. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of the Court.

9a-10a. This second ground was neither briefed nor argued by either party at trial or on appeal. The court also noted in passing that it was doubtful whether Petitioners, as local police officers, had statutory authority to question Respondent about her federal immigration status. However, the court ultimately expressed no opinion on this issue. Pet. App. at 13a n.15.

SUMMARY OF ARGUMENT

The judgment below should be affirmed for the reasons set forth in Respondent's brief. *Amici* do not repeat those arguments here. Instead, this brief focuses on Petitioners' claim, defended in part by the United States as *amicus curiae*, that as local law enforcement officers Petitioners had authority to enforce the federal immigration laws. As *amici* explain herein, the arguments advanced by both the United States and Petitioners are incorrect as a matter of law. Analysis of this Court's caselaw and the various federal statutory provisions on this subject makes clear that Petitioners did not have legal authority to question Respondent concerning her immigration status. However, this Court need not and should not resolve this issue, both because it may affirm the jury's verdict without considering it, and because the factual record from the trial court is incomplete on the subject.

Petitioners claim that, as local law enforcement officers, they had statutory authority to interrogate and investigate Respondent, a lawfully present permanent resident, regarding her right to be in the United States under federal immigration law. This assertion is incorrect.

Congress, acting under its well-established power to make laws governing the entry and exit of aliens and to implement those laws through the regulation of aliens present in the United States, has pre-empted any state or local authority to enforce the immigration laws, including any authority to interrogate or investigate aliens such as Ms. Mena concerning their compliance with the federal immigration laws.

For over a century, this Court has made clear that Congress has pre-eminent authority to legislate in the immigration field and regulate aliens present within the United States. During that time, the Court has repeatedly struck down state attempts to regulate in areas where the federal government has established its own rules, particularly where the states' rules impose burdens on lawfully-admitted aliens. *See infra* Part I.A.

The current federal immigration laws and regulations contain a comprehensive scheme regulating the investigation, interrogation, search, detention, and arrest of aliens. This scheme specifies both which officers may engage in these enforcement activities and under what conditions they may do so. These detailed laws and regulations pre-empt any state law purporting to authorize state or local officials to investigate, interrogate, search, or otherwise enforce the federal immigration laws. *See infra* Part I.B.

Congress also has enacted legislation specifically setting forth narrowly circumscribed conditions under which state and local officials may enforce the immigration laws. The text and legislative history of these provisions make clear that they strike a careful balance by providing some authority to state and local officers but limiting that authority in significant ways. Careful analysis

of the statutory text and history resolves any doubts concerning whether or not state authority to enforce the immigration laws has been pre-empted. *See infra* Part I.C.

Petitioners and the United States do not appear to agree on the purported basis for Petitioners' statutory authority to interrogate Respondent, or on the scope of that authority. The United States contends either that Petitioners acted lawfully because they sought only to question Respondent, a doubtful characterization given that they handcuffed her at gunpoint and searched her purse at the time of the questioning, or that they acted pursuant to a federal statute that contemplates, at least in certain circumstances, cooperation between local and federal officials in enforcing the immigration laws. Petitioners, in contrast, claim that state law grants them authority to enforce federal criminal immigration laws, and that the particular criminal immigration law they were enforcing in this case requires aliens to carry their immigration documents at all times. Neither claim is persuasive. The federal statute cited by the United States was never intended to confer on local officials the free-wheeling authority to investigate any and all immigration violations, and the state authority Petitioners rely upon has been pre-empted by a comprehensive scheme of federal regulation. *See infra* Part I.D.

ARGUMENT

Both Petitioners and Respondent agree that the Ninth Circuit should not have commented upon the question whether Petitioners had authority to question Ms. Mena concerning her immigration status. This is not surprising;

Ms. Mena never pled in the complaint, argued at trial, or briefed on appeal the argument that Petitioners lacked statutory authority to question her concerning her immigration status. The opinion below explicitly declined to resolve the issue, *see* Pet. App. at 13a n.15, and neither of the parties' briefs here addresses it in any detail. Nor does it appear to be fairly subsumed within either of the questions presented.

Accordingly, in our view the Court need not and should not resolve the issue concerning Petitioners' statutory authority under the immigration laws, as it is unnecessary in order to affirm the judgment below. However, if the Court does consider that issue on this sparse record, it must conclude that the Petitioners lacked authority to interrogate and investigate Respondent concerning her immigration status.

I. CONGRESS HAS PRE-EMPTED ANY STATE-CREATED AUTHORITY TO ENFORCE THE FEDERAL IMMIGRATION LAWS

A long line of this Court's cases establish that where the federal government has regulated in an area concerning immigration, the Supremacy Clause pre-empts state authority to regulate in that same area. Congress has heavily regulated the power to interrogate, investigate, search, detain, and arrest aliens for violations of the immigration laws. Where such detailed regulation exists, this Court's cases make clear that any state law regulating the same general area is displaced. Any doubt about the pre-emptive force of the federal statutes in this area is resolved by the detailed federal immigration provisions governing the extent to which state and local officials may enforce the federal immigration laws. Where, as here, the

federal government has regulated precisely the same area that a state law also purportedly governs, the state law is pre-empted.

A. This Court Has Made Clear That the Federal Government Has Pre-Eminent Authority to Establish and Enforce the Immigration Laws

For over one hundred years, this Court has recognized the federal government's pre-eminent authority both to make the laws governing the entry and exit of aliens and to implement those laws through the regulation of aliens present in the United States. Consistent with this constitutional principle, the Court has repeatedly struck down state statutes that regulate in this area on Supremacy Clause grounds. "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the states. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, *and for the manner of their execution*, belongs solely to the national government." *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (emphasis added). Since that time, this Court has repeatedly emphasized Congress' unique power in this sphere. *See, e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (noting that the authority to control immigration is "vested solely in the Federal Government, rather than the States"). Moreover, the Court has not limited its understanding of the federal government's power to enforce the laws in this area to monitoring aliens at the point of entry. Rather, the Court has recognized the federal government's power over the regulation of aliens

within the country as well, *see Hines v. Davidowitz*, 312 U.S. 52, 69-70 (1941).[2]

This Court's decision in *Hines* makes clear that the issue presented in this case squarely implicates the federal government's immigration power. *Hines* involved a state statute requiring that aliens lawfully present in Pennsylvania provide certain information to allow the state to monitor them, as part of a registry program. 312 U.S. at 59. Shortly after its passage, the federal government enacted a similar, but less burdensome, registration system. *See id.* at 60. This Court held that the federal scheme pre-empted the state registration system. "When the national government by treaty or statute has established rules . . . touching the rights, privileges, obligations or burdens of aliens as such . . . [n]o state can add to or take from the force and effect of such treaty or statute." *Id.* at 62-63.

Most important for present purposes, the Court found the state law pre-empted because it burdened aliens by subjecting them to questioning at the behest of Pennsylvania state officers in a way not contemplated by the federal scheme:

> Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens – *such as subjecting them alone, though perfectly*

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[2] At times, the Court has also found pre-emption over state laws regulating the economic status of aliens. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 421-22 (1948) (striking down state-imposed commercial fishing restrictions on aliens); *see also Graham v. Richardson*, 403 U.S. 365, 378 (1971) (holding that "[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with . . . overriding national policies").

> *law-abiding, to indiscriminate and repeated interception and interrogation by public officials* – thus bears an inseparable relationship to the welfare and tranquillity of all the states. . . . Laws imposing such burdens . . . provoke questions in the field of international affairs. . . . And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Id. at 65-67 (emphasis added). Thus, *Hines* made clear that where a state attempts to regulate and monitor the presence of aliens through questioning beyond that authorized by federal law, the state law cannot survive if the federal government has regulated the same area.

More recent cases confirm the continuing vitality of *Hines'* rule. In *Toll v. Moreno*, 458 U.S. 1 (1982), the Court reiterated that "[u]nder the Constitution the states . . . can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States." *Id.* at 11. In doing so, the Court struck down a Maryland statute prohibiting certain temporary residents from receiving in-state tuition under state law primarily because the federal government allowed that same class of residents to establish domicile for purposes of federal law. *Id.* at 14. Again, because the federal government had legislated in the same

general area concerning aliens, the state could not regulate that area.[3]

In contrast, this Court has upheld state regulation of the conduct of non-citizens only where the laws in question involved areas sparsely regulated by Congress, and even then only where the laws did not place burdens on lawfully admitted aliens. *See De Canas v. Bica*, 424 U.S. 351, 358-61 (1976) (finding state law prohibiting employers from knowingly hiring undocumented workers not pre-empted because federal legislation on the subject was extremely sparse and state law did not burden lawfully present aliens).

Under the pre-emption doctrine established by these cases, it is clear that where Congress has legislated in any detail in an area concerning the treatment of aliens under the immigration laws, the states may not establish or exercise their own independent authority over aliens in that same area. Moreover, when the state authority in question burdens lawfully-admitted aliens in an area where Congress has already chosen to impose some burdens on that class of aliens, the pre-emptive force of federal law is greater still.

B. Congress Has Granted to the Attorney General the Power to Interrogate, Search, Detain, and Arrest Aliens and Carefully Delineated the Scope of That Power

Congress has exercised its plenary authority over the admission and exclusion of aliens by conferring broad

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[3] This Court has also continued to cite *Hines* to explain its pre-emption jurisprudence in other contexts. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing *Hines*, 312 U.S. at 66-67).

authority upon the Attorney General to interrogate, search, detain, and arrest aliens under certain carefully delineated circumstances. Any state authority to enforce in this area is pre-empted by this comprehensive and delicately balanced set of federal laws.

The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952), codified as amended at 8 U.S.C. 1101 *et seq.*, which this Court has described as "a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents," *Elkins v. Moreno*, 435 U.S. 647, 664 (1978), specifically grants the Attorney General broad power to designate particular *federal* officers to engage in a broad range of explicitly defined enforcement activities. *See, e.g.*, 8 U.S.C. 1357(a)(1)[4] (granting authority to "interrogate any alien . . . as to his right to be or to remain in the United States"); 8 U.S.C. 1357(a)(2), (4) (conferring authority to "arrest" any alien for civil and criminal violations of the federal immigration laws under certain designated circumstances); 8 U.S.C. 1357(a)(3) (granting, within a "reasonable distance" of the border, authority to "board" any vessel, railway car, aircraft, conveyance, or vehicle in order to "search for aliens," and within twenty-five miles of the border, to "have access to private lands, but not dwellings" in order to patrol the border to prevent illegal entry of aliens); 8 U.S.C. 1357(c) (granting authority to "conduct a search, without warrant," of individuals

[4] Unless otherwise noted, all citations to the U.S. Code are to the current version. Where relevant, the date of original enactment is indicated parenthetically.

seeking admission to the United States upon "reasonable cause" to suspect grounds to deny such admission).

The scope of the INA's grant of enforcement authority is comprehensive yet painstakingly specified. Congress intended, for example, to "make a very carefully considered distinction between powers which may be exercised without warrant and such where a warrant will be required." H. Rep. No. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1710. Moreover, when Congress amended Section 1357(a) in 1990 to "enhanc[e]" and "broaden[]" the federal government's enforcement authority by granting the Attorney General power to authorize immigration officers to make arrests for certain federal criminal offenses unrelated to immigration,[5] it precisely specified the categories of federal crimes for which such arrests would be permitted and explicitly made that authority subject to several conditions, including (1) that the immigration officer be "performing duties relating to the enforcement of the immigration laws at the time of the arrest," and (2) that there be "a likelihood of the person escaping before" an arrest warrant could be obtained.[6] 8 U.S.C. 1357(a)(5). *See also* 8 U.S.C. 1357(a)(5)(A) (conferring authority to "make arrests" for "offense[s] against the

[5] Immigration Act of 1990, Sec. 503(a), 101 Pub. L. No. 649, 104 Stat. 5048 ("Sec. 503. Enhancing Enforcement Authority of INS Officers. (a) Broadening Authority.")

[6] Section 1357(a)(5) also provides that its authority to arrest for federal felonies only shall be effective upon the Attorney General's publication of regulations, *inter alia*, establishing standards for the government's enforcement activities, specifying the particular federal officials who may use force and the circumstances under which they may do so, and requiring that no officer may exercise the INA's federal felony arrest authority unless they have completed a training program that covers these standards. 8 U.S.C. 1357(a)(5).

United States" that are "committed in the officer's ... presence"); 8 U.S.C. 1357(a)(5)(B) (authority to "make arrests" for "felon[ies] cognizable under the laws of the United States" that the officer has "reasonable grounds to believe" the arrestee has committed).

The Attorney General has issued detailed regulations to implement Congress' grant of enforcement authority, designating the particular immigration officers who are authorized to exercise these enforcement powers and the circumstances under which they may do so. *See, e.g.*, 8 C.F.R. 287.5(a)(1) (designating certain officers authorized to "interrogate" aliens pursuant to 8 U.S.C. 1357(a)(1)); 8 C.F.R. 287.5(b) (designating certain officers authorized to patrol the border pursuant to 8 U.S.C. 1357(a)(3)); 8 C.F.R. 287.5(c) (designating certain officers authorized to exercise authority to make arrests for immigration violations and certain federal criminal violations under 8 U.S.C. 1357(a)(2), (4)-(5), and setting forth detailed standards and guidelines for exercise of arrest authority). These regulations are the result of the Attorney General's "overriding policy [] that an officer should be given only the authorities that the officer needs and has been trained to execute." 59 Fed. Reg. 42406, 42408 (Aug. 17, 1994) (citing Attorney General's "Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority" (June 29, 1984)). Since "[e]ach category of immigration officers has a different mission," the regulations implementing the INA's grant of enforcement authority reflect a conscious determination that "only those categories [of officers] who satisfied the Attorney General's criteria [would be] granted one or more of the enforcement authorities" conferred by the INA. *Id.*

Taken as a whole, these provisions make clear that Congress and the Attorney General have carefully regulated both who may exercise the powers to "interrogate" and "search" under the federal immigration laws and when those powers may be exercised. Where the federal immigration laws specify the extent of this authority in such detail, state provisions granting additional authority are pre-empted. *See Hines*, 312 U.S. at 66-67.[7]

C. The Federal Government Has Delegated Immigration Enforcement Authority to State and Local Officers in Certain Narrowly Circumscribed Areas

Any remaining doubt that state laws purporting to authorize state and local officers to enforce the immigration laws are pre-empted should be resolved by reference to the detailed federal provisions governing state and local enforcement of the federal immigration laws. The federal government has provided limited authority for state and local officers to enforce the immigration laws in certain contexts. These provisions establish that Congress has

[7] The United States suggests that no provision of the immigration laws cited by the court of appeals in this case could prohibit a local law enforcement officer from *asking questions* to determine whether or not a particular individual is lawfully present. While the court of appeals' treatment of this issue was extremely cursory, a more detailed examination reveals that Congress and the Attorney General took great pains to specify who has the power to *interrogate* aliens and when they may exercise that power. In any event, it is doubtful that the officers' actions could be characterized as simply asking questions. Having handcuffed Ms. Mena at gunpoint and searched her purse at the time of the questioning, the officers' actions here appear to have included both involuntary questioning, i.e. interrogation, and a "search" within the meaning of the federal immigration laws.

carefully regulated the field governing state and local enforcement of the federal immigration laws, and thereby displaced any state laws on this subject.

1. Authority to Enforce Provisions Relating to Smuggling, Transporting, and Harboring Aliens

Congress authorized state and local officers to enforce provisions relating to criminal alien smuggling in 1952, with the passage of 8 U.S.C. 1324(c) (originally enacted as Immigration and Nationality Act of 1952, sec. 274(b), Pub. L. No. 82-414, 66 Stat. 228, 229 (1952)). That provision states that "[n]o officer or person shall have authority to make any arrests for a violation of any provision of this section [relating to smuggling, transporting, and harboring undocumented immigrants] except officers and employees of the Service designated by the Attorney General *. . . and all other officers whose duty it is to enforce criminal laws.*" 8 U.S.C. 1324(c) (emphasis added).

Thus, Congress has clearly provided state and local officials authority to arrest for violations of the federal smuggling, transport, and harboring provisions, as long as those state and local officials otherwise have authority to enforce the criminal laws.[8]

[8] The legislative history of this provision confirms that Congress made a conscious choice to allow state and local officers to enforce this provision. *See* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1092-93 (2004).

2. Authority to Enforce Any Immigration Power During Mass Influx

In 1996, as part of the comprehensive immigration legislation enacted first in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and then in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), Congress enacted three sets of provisions that provided detailed rules governing the conditions under which state and local officers could enforce federal immigration laws beyond the limited power established over forty years earlier. First, Congress granted state and local officials authority to enforce any provision of the immigration laws during situations of so-called "mass influx." That provision, now codified at 8 U.S.C. 1103(a)(10), provides that:

> In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer . . . to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter . . . upon officers or employees of the Service.

Id. Unlike Section 1324(c), this provision allows the Attorney General to give local officials any of the authority granted to federal immigration officers, but only allows the Attorney General to make this delegation during situations involving a mass influx occurring near the border.

3. Authority to Enforce Provisions Governing Criminal Illegal Reentry

The second such provision was 8 U.S.C. 1252c, which provides authority for state and local law enforcement officers to enforce the criminal illegal reentry provisions where they receive prior confirmation from INS officials concerning the status of the alien in question.

The statute provides in relevant part:

> Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who –
>
> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual. . . .

8 U.S.C. 1252c(a). Thus, Section 1252c allows local officers to detain and arrest aliens who are illegally present, but only if those aliens have been removed following a felony criminal conviction, and only after the state or local officials obtain appropriate confirmation of the alien's status from INS.

The legislative history of the provision makes clear both that Congress recognized that it had not granted general authority to enforce the immigration laws to state and local officers, and that Congress intended to confer authority only in felony illegal reentry cases where confirmation of status

with the INS had taken place. What is now Section 1252c was first introduced as an amendment to the House Bill that later became AEDPA. Representative Doolittle (R. Calif.) introduced the measure, expressing concern about the absence of authority for state and local law enforcement officials to arrest people for criminal immigration violations:

> In fact, the Federal Government has tied the hands of our State and local law enforcement officials by actually prohibiting them from doing their job of protecting public safety. I was dismayed to learn that the current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encountered through their routine duties.

142 Cong. Rec. H 2190, 2191 (1996) (statement of Rep. Doolittle).[9] However, in the very same set of introductory remarks, he noted that some members had expressed concern about the authority created by the bill, and that he had assuaged those concerns by limiting his bill to encounters with "criminal aliens" and requiring prior confirmation with INS officials:

> Mr. Chairman, by way of summary, I would like to allay fears or concerns that Members may have about the scope of my amendment.
>
> . . . .

[9] This passage also makes clear that the members of Congress understood federal law to preclude state and local arrests for immigration violations in the absence of Congressional authorization. This understanding is consistent with this Court's law governing field preemption in the immigration context, as described *supra* Part I.A.

> [M]y amendment is very narrow and *only covers situations in which the State or local officer encounters criminal aliens within his routine duties. . . . Only confirmed criminal aliens are at risk of being taken into custody.*

Id. (emphasis added). *See also id.* at 2190.

Thus, the legislative history confirms what the statute's text makes clear: that Congress specifically intended to allow arrest and detention by state and local law enforcement officers, but only where they encountered a reentering *criminal alien* and obtained prior confirmation of the person's status, and that Congress prohibited arrest and detention by state and local officers where those conditions were not satisfied.[10]

4. Authority Conferred Pursuant to Written Agreement

Congress passed another even more detailed provision concerning state and local law enforcement authority as part of its comprehensive immigration legislation in 1996.

[10] Several courts of appeals have considered the effect of these provisions in a variety of contexts. In *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), the Tenth Circuit found state authority to arrest for violations of the criminal illegal reentry statute, 8 U.S.C. 1326, which Congress has specifically authorized in Section 1252c. *See Vasquez-Alvarez*, 176 F.3d at 1299-1300. To the extent the Tenth Circuit could be understood to have commented on any broader authority, such comments are dicta. In *Carrasca v. Pomeroy*, 313 F.3d 828, 835-37 (3d Cir. 2002), the Third Circuit expressed doubts concerning the authority of local officials to enforce the federal immigration laws. Finally, although the United States refers to the Seventh Circuit's decision in *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002), that case involved questioning by a federal immigration officer, not by a state or local official. *See id.* at 489.

Section 1357(g) of Title 8 provides the Attorney General with authority to enlist state and local officials in the enforcement of the immigration laws even in the absence of a mass influx, provided that their involvement occurs pursuant to a written agreement with the state or local government that satisfies certain conditions. 8 U.S.C. 1357(g). This provision allows the Attorney General to authorize particular designated state or local officers to perform any "function of an immigration officer in relation to the *investigation*, apprehension, or detention of aliens in the United States." 8 U.S.C. 1357(g)(1) (emphasis added). However, Section 1357(g) also requires that the Attorney General determine that those state and local officers are qualified to perform federal immigration enforcement functions, 8 U.S.C. 1357(g)(1), that the designated state and local officers be trained in the enforcement of relevant federal immigration laws (and that the agreement include a written certification that the officers' training was adequate), 8 U.S.C. 1357(g)(2), that the Attorney General maintain supervisory control and direction over those state and local officers, 8 U.S.C. 1357(g)(3), and that there be a "written agreement" that details "the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual." 8 U.S.C. 1357(g)(5).

The legislative history of this provision confirms that Congress sought to give state and local governments the option to designate certain officers to work with federal officials to enforce provisions of the immigration laws, but only by executing a written agreement with the Attorney General that identifies the officers to be designated, sets

forth the nature and extent of their involvement in some detail, ensures that those officers receive appropriate training in the enforcement of federal immigration laws, and provides for complete federal oversight and control over those officers' involvement with immigration enforcement. Representative Latham, who sponsored an amendment that would have gone even further than Section 1357(g) in authorizing state and local involvement in immigration enforcement,[11] noted that under then-existing federal law:

> there is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the local INS officer to report the case. . . . My amendment will allow State and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, apprehend, and detain those illegal aliens. . . . [This amendment operates] [b]y allowing – not mandating – State and local agencies to join the fight against illegal immigration.

142 Cong. Rec. H 2475, 2476-77 (1996) (statement of Rep. Latham).[12] In response, Representative Becerra noted the

[11] Representative Latham's amendment would have authorized the Attorney General to "deputize" any law enforcement officer of any state or local government with the consent of that state's governor and pursuant to a written agreement, but without the detailed conditions concerning training, federal supervision, and specificity in the granting of enforcement authority that Section 1357(g) requires. *See* Immigration in the National Interest Act of 1996, H.R. 2202, 104th Cong. Section 365 (1996).

[12] As Representative Latham recognized, pre-existing law permitted state and local officials to share with INS information pertaining to suspected aliens, but did not permit them to "seek" such information independently. This understanding was formalized in what became 8

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concerns of some members that without adequate training and oversight, discrimination could result:

> You do not find the California Highway Patrol or any other State's highway patrol trying to enforce national immigration law. And that is because those are separate and distinct activities. . . . A law enforcement officer with the border patrol is taught and trained on how to conduct himself. . . . [A]s someone who is a member of an ethnic minority, it disturbs me when I hear that we will now have people who are not trained to do a specific type of law enforcement work out there doing something which has in the past caused harm, injury, and discrimination against certain classes of individuals.

Id. at 2477 (statement of Rep. Becerra). Representative Jackson-Lee added that such a provision would undermine police effectiveness:

> I know how important it is for local law enforcement to establish trust with all of the ethnic and minority groups and communities in their cities. . . . It is dangerous to put immigration authority in these local law enforcements [sic] so that they cannot do their real job, which is to protect those communities and . . . engender

U.S.C. 1357(g)(10), which explicitly states that it does not alter this pre-existing authority. *See infra* Part I.C.4. Under the balance Congress struck, state and local officials are not barred from sharing with the Attorney General information concerning immigration violations which they obtain during the course of conducting their routine duties, but state and local officials may not affirmatively seek such information, unless specifically authorized by federal law.

> trust in the community so that they can get the job done.

Id. at 2478 (statement of Rep. Jackson-Lee).[13]

This extensive debate makes clear that instead of enacting a more sweeping measure authorizing state and local enforcement of immigration laws under nearly any circumstances, Congress decided to pass a more limited measure authorizing certain specifically-designated state and local officers – who otherwise would not have authority to investigate or otherwise enforce the immigration laws – to do so only if their state or local government entered into a written agreement with the Attorney General providing for, *inter alia*, appropriate training and complete federal oversight of those officers. As with the other provisions allowing state and local officials to enforce the immigration laws, Section 1357(g) sought a balanced approach that allowed for such enforcement in some situations, but subjected that authority to certain Congressionally-mandated limitations. If Congress believed that state and local officers had general authority to enforce the immigration laws, its limited grant of authority under this provision would have been entirely unnecessary.[14]

* * *

[13] Representative Latham added, towards the end of the debate, that "this is a voluntary program where the INS, on a voluntary basis, with local law enforcement, or the State, join in an agreement, and whatever controls or restrictions put in that agreement, it is up to that agreement [sic]." 142 Cong. Rec H 2475, 2480 (1996) (statement of Rep. Latham).

[14] At least two jurisdictions have entered into such written agreements. *See* Wishnie, *supra* n.8, at 1094.

Given the complexity of the provisions authorizing state and local officials to enforce the immigration laws, the level of detail at which they operate, and the delicate balance struck by the different provisions, there can be no doubt that, taken as a whole, the federal immigration laws have pre-empted state authority to investigate or otherwise enforce the federal immigration laws. *See generally Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941); *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982); *Graham v. Richardson*, 403 U.S. 365, 378 (1971); *cf. Gonzales v. Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983). The United States' assertion that these provisions do not encompass Petitioners' questioning of Ms. Mena concerning her immigration status is untenable in light of the specific provisions governing the power to "interrogate" and "investigate," as well as this Court's caselaw concerning pre-emption in the face of state-imposed "interrogation." *See* 8 U.S.C. 1357(a); 8 U.S.C. 1357(g)(1); *Hines*, 312 U.S. at 66.

D. Neither the United States nor Petitioners Have Identified Statutory Authority in Support of Petitioners' Actions in this Case

Although the United States does not discuss in any detail any of the provisions analyzed above, it asserts that a provision in the section of the immigration laws concerning written agreements between the Attorney General and local law enforcement agencies "*allows* local law enforcement officials 'to communicate with the Attorney General regarding the immigration status of any individual . . . ' and 'otherwise to cooperate with the Attorney General in the identification . . . of aliens not lawfully present.' " Br. of United States at 26 n.10 (citing 8 U.S.C. 1357(g)(10)) (emphasis added).

The provision on which the United States relies states in full that:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State –
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. 1357(g)(10).

However, by its terms 8 U.S.C. 1357(g)(10) does not in fact "allow" anything. Rather, it states only that the section concerning written agreements does not require such an agreement for any local official to, *inter alia*, communicate or cooperate with the Attorney General in identifying certain aliens. To read Section 1357(g)(10) as an affirmative grant of authority to allow cooperation with the Attorney General in the identification or apprehension of aliens at any time, whether or not any written agreement is in place, would render the specific grants of authority in 8 U.S.C. 1103(a)(10), 1252c(a), 1324(c), and 1357(g) meaningless and do violence to the plain language of Section 1357(g)(10), which by its terms does not affirmatively authorize anything. Indeed, such a reading would produce the bizarre conclusion that states or localities which enter into written agreements with the Attorney

General would actually have less authority to enforce the immigration laws than those which do not, because the written agreements contain limitations (such as the training requirement) that would not be present in the absence of any agreement.

When read in light of the other provisions in Section 1357 and the rest of the immigration laws concerning state and local enforcement, it is clear that Section 1357(g)(10) merely establishes that where the INA *already authorizes* state and local law enforcement of the immigration laws, as in Sections 1103(a)(10), 1252c(a), and 1324(c), no separate written agreement is required to implement the authority granted in those sections. Such a reading also comports with the legislative history, which shows that the drafters of the section recognized that state and local officers already had authority to share immigration-related information with the Attorney General if they came upon it during the course of their routine duties, but that they could not independently seek such information, because that authority had been vested exclusively in the Attorney General. *See supra* at Part I.C.3. and Part I.C.4.[15]

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[15] Even if Section 1357(g)(10) could be read as a grant of authority, it would only authorize the local officers to share information with the Attorney General and to cooperate with him, not to interrogate aliens on their own initiative. The record does not reflect whether the interrogation and search which occurred here were undertaken at the behest of the INS official or on Petitioners' own initiative. If it occurred at Petitioners' own initiative, it would not be authorized even under the United States' exceedingly broad reading of Section 1357(g)(10).

Even if Petitioners were cooperating with the INS officer within the meaning of Section 1357(g)(10), they may not have had authority to question Ms. Mena if the INS officer had no authority to enter her house, and it is not at all clear that he had such authority under federal law. *See* 8 U.S.C. 1357(a) ("Under regulations prescribed by the

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Petitioners seek to justify their questioning of Ms. Mena by arguing that state law gave them authority to enforce the *criminal* immigration laws. They state that California law purportedly gives them power "to arrest for any 'public offense' committed in their presence," Pet. Br. at 25, and assert that they were enforcing 8 U.S.C. 1304(e), which requires lawfully admitted aliens to carry their registration documents with them. *See* 8 U.S.C. 1304(e).[16]

However, Petitioners fail to cite, let alone analyze, any of the numerous federal immigration law provisions which pre-empt the authority they claim under state law. As noted, Sections 1324(c) and 1252c contain express authorization for state and local officials to enforce certain criminal immigration laws under certain specified conditions, but the immigration laws do not provide such authority to enforce Section 1304(e). Where such express authorization exists with respect to some sections of the statute, the

---

Attorney General, an officer . . . of the Service . . . may execute and serve any order, warrant . . . or other process issued *under the authority of the United States*.") (emphasis added). If he did not, the INS officer's presence may have violated Ms. Mena's Fourth Amendment rights. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614 (1999) (holding that officers violated Fourth Amendment by bringing reporter into home while executing search warrant when the presence of the reporter in the home "was not in aid of the execution of the warrant").

[16] There is considerable tension between the arguments presented by the United States and those presented by the Petitioners concerning local officials' authority to enforce the immigration laws. Petitioners apparently contend that they had power only to enforce the criminal immigration provisions, whereas the United States suggests that their power extended to civil violations as well, at least as a matter of federal law. The United States does not discuss the extent of Petitioners' authority under California law, which obviously may limit Petitioners' authority independent of any limits created by federal law.

states may not "complement" that authority with respect to others. *See, e.g., Hines*, 312 U.S. at 66.

Petitioners also cite a Ninth Circuit opinion from 1983 in support of their position. *Gonzales v. Peoria*, 722 F.2d 468 (9th Cir. 1983). But the premise of *Gonzales* was that while the federal government had occupied the field of civil immigration enforcement, the federal statutes relating to criminal immigration law were "few in number and relatively simple in their terms." 722 F.2d at 475. This holding has no validity today, because Congress has enacted various detailed and complex statutes relating to federal criminal immigration enforcement in the twenty years since *Gonzales* was decided.[17]

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[17] *See, e.g.*, 8 U.S.C. 1160(b)(7) (originally enacted in 1986) (penalizing false statements in applications for Special Agricultural Worker visas); 8 U.S.C. 1253(a)(1) (originally enacted in 1996) (containing four different provisions penalizing conduct related to failing to depart under an order of removal); 8 U.S.C. 1255a(c)(5)(E) (originally enacted in 1996) (penalizing violations of confidentiality rules under amnesty program); 8 U.S.C. 1324a(f) (originally enacted in 1986) (penalizing employers for pattern of employing unlawful aliens); 8 U.S.C. 1324c (originally enacted in 1990) (penalizing document fraud); 8 U.S.C. 1325(c) (originally enacted in 1986) (penalizing immigration-related marriage fraud); 8 U.S.C. 1325(d) (originally enacted in 1990) (penalizing immigration-related entrepreneurship fraud); 8 U.S.C. 1326(b)(1)-(2) (originally enacted in 1988) (providing detailed penalties for reentry after removal based upon commission of certain misdemeanor, felony, or aggravated felony offenses).

Even in 1983, the *Gonzales* court's interpretation of the statute was at war with its plain text. *Gonzales* analyzed a provision in Section 1324, which concerns the smuggling, harboring, and transporting of aliens, that authorized state and local officials to arrest for violations of that section. *See* 8 U.S.C. 1324(c); *supra* at Part I.C.1. The court held that this section implicitly authorized state and local officials to arrest for violations of two neighboring sections – 8 U.S.C. 1325 and 1326 – even though neither section contained a similar provision granting

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Finally, even if Petitioners possessed authority under state law to enforce Section 1304(e) and that authority was not pre-empted, such authority would not justify the interrogation in this case, as the officers did not have reasonable suspicion to believe that Ms. Mena was a lawfully admitted alien not in possession of her registration documents. Ironically, Petitioners inadvertently concede this by claiming that they had reasonable suspicion to believe Ms. Mena was illegally present. Pet. Br. at 23. But if this were the case, they could not have had reasonable suspicion to question her concerning a violation of Section 1304(e), because that provision only applies to aliens who have registered with the immigration authorities.

In any event, even if Petitioners had reasonable suspicion to believe that Ms. Mena was a lawfully admitted alien, the record does not disclose any reason whatsoever to believe that she was not in possession of her documents. Interpreting Section 1304(e) to authorize investigation in the absence of such suspicion would transform that provision into a vehicle for local officers to

authority to state and local officials. This holding was untenable under basic principles of statutory construction. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations omitted).

Nonetheless, the *Gonzales* court found that the legislative history of Section 1324 trumped the plain language of the statute. 722 F.2d at 475. Even if such an inference were permissible, the court's reading of that history is unpersuasive, as the history shows only that Congress sought to expand authority to arrest for violations of the offenses related to alien smuggling. *See id.*

investigate anyone to determine if they were an alien, because doing so would then create authority to see if they were carrying appropriate documents. Yet Congress obviously did not intend this result, as it authorized state and local officers to "investigate" violations of the immigration laws only pursuant to written agreements with the Attorney General and in the other narrowly circumscribed conditions described above. *See* 8 U.S.C. 1357(g)(1). Read in light of the provisions governing civil immigration enforcement, it is clear that Section 1304(e) authorizes interrogation or investigation only where officers already have some reasonable suspicion that the target of their investigation is an alien who is not carrying his or her documents in violation of the statute. *See Mountain High Knitting v. Reno*, 51 F.3d 216, 219 (9th Cir. 1995) (holding that "[t]he § 1304(e) arrest power does not permit 'rounding up the suspects' *simply* in order to investigate aliens' immigration status.").[18]

CONCLUSION

This Court should affirm the court of appeals' decision for the reasons set forth in Respondent's brief. In doing so, it need not and should not decide whether Petitioners'

[18] For similar reasons, Sections 1324(c) and 1252c must be read to authorize interrogation only when state or local officers have some prior reasonable suspicion to believe that the subject of their questioning is violating the relevant criminal provisions. Neither provision could authorize the questioning that took place in this case, where there was no reason to suspect either that Ms. Mena was knowingly smuggling, transporting, or harboring undocumented aliens or that she had illegally reentered the country after being deported for a felony conviction.

action in questioning Respondent concerning her immigration status violated the Supremacy Clause. However, if the Court chooses to address the question, it should conclude that because no federal statute authorized Petitioners' interrogation and investigation of Respondent in this case, the state statutes purporting to authorize that activity violate the Supremacy Clause.

Dated: November 3, 2004

Respectfully submitted,

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IN THE
Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,
Petitioners,

v.

IRIS MENA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief *amicus curiae* in support of respondent.[1]

INTEREST OF *AMICUS CURIAE*

NACDL is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice, including by ensuring that the conduct of police officers is consistent with constitutionally-required procedures. Consistent with this aim, NACDL has filed *amicus curiae* briefs in this Court in many cases involving the Fourth Amendment, including, recently, in *United States v. Arvizu*, 534 U.S. 266 (2002), and *United States v. Knights*, 534 U.S. 112 (2001).

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[1] This brief is filed with the written consent of both parties. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

Petitioners, supported by the United States as *amicus curiae*, argue that, when law-enforcement officers detain a person incident to the execution of a search warrant (as permitted by *Michigan v. Summers*, 452 U.S. 692, 705 (1981)), they may freely interrogate that person on any subject whatsoever, with the only limitation being that the interrogation must not stretch the duration of the detention. Adoption of that argument would constitute a dramatic and unwarranted expansion of law enforcement's investigative powers. Under this Court's established precedent, any seizure based upon less than probable cause must be limited to the justification for the seizure. Thus, a person who is detained without probable cause may be interrogated only concerning matters related to the circumstances that justified the seizure.

I. WHEN A SEIZURE IS BASED ON LESS THAN PROBABLE CAUSE, THE FOURTH AMENDMENT PROHIBITS INTERROGATION CONCERNING SUBJECTS UNRELATED TO THE SEIZURE'S JUSTIFICATION.

A. As a General Rule, the Fourth Amendment Allows Seizure Only upon a Showing of Probable Cause.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Its 'central requirement' is one of reasonableness." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (quoting *Texas v. Brown*, 460 U.S. 730, 730) (1983). Whether a search or seizure is reasonable for purposes of the Fourth Amendment has long turned on the "familiar threshold standard of probable cause." *Dunaway v. New York*, 442 U.S. 200, 213 (1979). As

the Court has noted, the probable-cause requirement "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule." *Id.* at 213. It is therefore of "central importance . . . to the protection of a citizen's privacy afforded by the Fourth Amendment." *Id.*

To be sure, this Court has in recent years held that whether a seizure is permitted by the Fourth Amendment may be determined more loosely "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S. Ct. 2451, 2459 (2004). *See also McArthur*, 531 U.S. at 331 (when warrantless restraint "involves a plausible claim of specially pressing or urgent law enforcement need," "rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns"). But, "[w]ith rare exceptions . . . , the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996). Conversely, the "general rule" is "that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." *Summers*, 452 U.S. at 700. Thus, probable cause remains the Fourth Amendment's gold standard.

B. *Summers* Provides a Limited Exception to the Probable-Cause Requirement.

Despite the general rule that a seizure must be supported by probable cause, a series of decisions beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), has recognized narrow circumstances in which the Fourth Amendment

permits searches and seizures upon less than probable cause. *See Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality) ("Prior to *Terry v. Ohio*, . . . any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause.") (citation omitted). "These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Summers*, 452 U.S. at 699.

Thus, in *Terry* itself, the Court recognized a "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry*, 392 U.S. at 27. As the Court explained, "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 24. Although the Court's analysis in *Terry* did not distinguish between seizure and search, the Court later "made explicit what was implicit in *Terry*," namely, "that the Fourth Amendment does not prohibit forcible stops when the officer has a reasonable suspicion that a crime has been or is being committed." *Summers*, 452 U.S. at 698 n.7.

Similarly, in *United States v. Brignoni-Ponce*, the Court held that the "modest" intrusion occasioned by a

"stop by a roving [border] patrol [that] usually consumes no more than a minute," could be "justified on facts that do not amount to the probable cause required for an arrest." 422 U.S. 873, 880 (1975). Although the Court rejected the Government's claim for authority to make such stops at random, it permitted Border Patrol agents to stop vehicles "if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.* at 884. In allowing such stops on less than probable cause, the Court "t[ook] into account the special function of the Border Patrol [and] the importance of the governmental interests in policing the border area." *Id.* at 883 n.8.

Drawing on these cases, the Court in *Summers* held that officers executing a search warrant of a dwelling could detain an occupant during the search, even if the officers (at the time of the initial detention) lacked probable cause or even reasonable suspicion of foul play. The Court stressed the "legitimate law enforcement interest[s]" in "facilitat[ing]" the "orderly completion of the search" and in minimizing "[t]he risk of harm to both the police and the occupants." *Summers*, 452 U.S. at 702-03. The Court reasoned that the detention of a resident incident to a search of the premises "add[ed] only minimally" to the intrusion authorized by the search warrant. *Id.* Such a detention, the Court noted, stands "[i]n sharp contrast to . . . custodial interrogation." *Id.* at 702.

C. The Justification for a Probable-Cause-Less Seizure Supplies the Measure of Its Permissible Scope.

Because *Terry* and its progeny recognized "exception[s] to the requirement of probable cause," the Court must be "careful to maintain" their "narrow scope." *Ybarra v.*

Illinois, 444 U.S. 85, 93 (1979). For that reason, the Court has faithfully applied the principle that an interference based on less than probable cause must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20; *see id.* at 19 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality) ("The scope of the detention must be carefully tailored to its underlying justification."); *McArthur*, 531 U.S. at 331 (upholding restraint that was "tailored" to a "plausible claim of specially pressing or urgent law enforcement need").

This limitation constrains interrogation just as surely as any other intrusion upon protected privacy interests. Thus, the Court stated in *Royer* that "reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of *questioning limited to the purpose of the stop*." 460 U.S. at 498 (plurality) (emphasis added); *see id.* at 500 ("the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion"). Similarly, the Court has stated that, where probable cause is lacking, "the stop *and inquiry* must be 'reasonably related in scope to the justification for their initiation.'" *Summers*, 452 U.S. at 710 (quoting *Terry*, 392 U.S. at 29) (emphasis added); *see also Hiibel*, 124 S. Ct. at 2460 (a "request for identification" must be "reasonably related to the circumstances justifying the stop"); *Brignoni-Ponce*, 422 U.S. at 881-82 ("The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.").

A majority of the courts of appeals that have addressed the matter has therefore correctly held that questioning of motorists at traffic stops must be related to the violation that gave rise to the stop. *See, e.g., United States v. Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001) ("During a traffic stop, a police officer is allowed to ask questions that are reasonably related in scope to the justification for his initiation of contact."); *United States v. Holt*, 264 F.3d 1215, 1228 (10th Cir. 2001) (en banc) (rejecting Government's argument that "during a traffic stop based on probable cause, length is the only constraint on questioning"); *United States v. Pruitt*, 174 F.3d 1215, 1220 (11th Cir. 1999) ("further questioning unrelated to the initial stop is permissible [only] if the initial detention has become a consensual encounter" or if "the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring"); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994) ("After stopping the truck, the trooper could ask any questions reasonably related to the stop.").

None of this is to say that, during a seizure on less than probable cause, law-enforcement officers must play dumb. Questioning related to the circumstances that justified the seizure is permitted. And, in the course of the seizure, additional "reasonable suspicion" or even "probable cause" may develop, which may justify further questioning. Barring that, however, questioning unrelated to the circumstances legitimizing the search constitutes an unwarranted intrusion. The law permits police to detain certain suspects without probable cause out of concern for officers' safety or other exigent circumstances — not to enable custodial interrogation. Thus, if officers would not be entitled to seize a person for the purpose of subjecting him to custodial questioning, they should not be allowed

to accomplish the same result as an undeserved by-product of the law's special concern.

D. Questioning During a *Summers* Detention Must Be Limited to Matters Related to the Execution of the Search Warrant.

The justification for a *Summers* detention is to facilitate the lawful execution of a search warrant and to protect officers engaged in doing so. Consistent with those goals, the police are entitled to detain occupants for the duration of the search, and to arrest them if the search provides probable cause to do so. But police may not take advantage of the detention to conduct a "general exploratory" investigation of criminal activity. *Terry*, 392 U.S. at 30.

Thus, interrogation of a *Summers* detainee, if any, must be related to the execution of the search warrant. *See Ganwich v. Knapp*, 319 F.3d 1115, 1122-23 (9th Cir. 2003) ("Because the interrogations of the plaintiffs were not carefully tailored to the detention's underlying justification, the detention was more intrusive than necessary. This rendered the detentions unlawful."). That means that interrogation is not permitted insofar as it "did not deter the plaintiffs' flight, did not reduce the risk of harm to officers, and did not assist the officers in the orderly completion of the search." *Id.*

Measured by that standard, the interrogation of the respondent in this case was impermissible. Officers detained respondent for several hours while they executed a search warrant issued in connection with a gang-related murder. The warrant authorized the police to search for Raymond Romero, for deadly weapons, and for "evidence of street gang membership or affiliation." JA 210-11. The officers' interrogation of respondent about her citizenship and immigration status had nothing to do with officer safety. Nor was it pertinent to the search: lack of

proper documentation hardly makes a suspect a gang member. Indeed, the very fact that petitioners brought along an INS agent indicates that the purpose of respondent's interrogation was immigration control, not investigation of possible gang activity.

Meanwhile, as the Court of Appeals pointed out, the interrogation lacked independent justification: apart from respondent's "apparent Hispanic/Latino ethnicity" — a factor that, standing alone, was insufficient to justify further inquiry[2] — "there was no reason evident in the record to be suspicious of her citizenship status." Pet. App. 10a. On the facts presented, therefore, the Court of Appeals correctly concluded that respondent stated a Fourth Amendment violation: petitioners "unduly invaded Mena's privacy by inquiring unnecessarily into her citizenship status." *Id.*

E. Petitioners' Argument — That Any Questioning of a *Summers* Detainee Is Permitted so Long as It Does Not Prolong the Detention — Is Mistaken.

Petitioners broadly contend that "the scope of a *Summers* detention is limited only by the time it takes to complete the search." Br. of Petitioners at 27. Similarly, the Government asserts that, "where . . . questioning of an occupant detained incident to a search warrant does not prolong the duration of the occupant's detention, the detention should be sustained." Br. of United States at 27. In support of their "duration is the only limitation" theory, Petitioners and the Government rely upon opinions in which this Court has stated that "mere police questioning

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[2] *See Brignoni-Ponce*, 422 U.S. at 885-86 ("single factor" of "apparent Mexican ancestry" does not "furnis[h] reasonable grounds to believe that the three occupants were aliens").

does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *see also INS v. Delgado*, 466 U.S. 210, 216 (1984). In the words of the Government, "because questioning does not constitute a discrete Fourth Amendment event, it follows that an officer need not have an independent justification, in the form of reasonable suspicion, before questioning an individual who has been lawfully detained." Br. of United States at 24; *see also* Pet. Br. at 18 ("questions do not become independent 'seizures' simply because they are asked of an individual who is already lawfully detained").

This argument is directly contrary to the Court's case law, which recognizes that probable-cause-less seizures must be limited not only in "duration" but also in "scope."[3] Moreover, the argument confuses two very different Fourth Amendment inquiries. The opinions upon which the Petitioners and the Government rely addressed the question whether a "seizure" has taken place — not whether, once a seizure has occurred, that seizure was "reasonable." The two inquiries turn on different facts: the former depends solely on curtailment of a citizen's freedom of movement, while the latter takes account of other privacy interests as well.

The Fourth Amendment does not govern every conceivable intrusion upon a citizen's privacy: by its terms, its reach is limited to "searches and seizures." U.S. Const. amend. IV; *see Delgado*, 466 U.S. at 215. In determining whether a "seizure" has occurred, the Court has

[3] *See, e.g., Royer*, 460 U.S. at 500 (plurality) (seizures based on less than probable cause must be "sufficiently limited in scope and duration"); *McArthur*, 531 U.S. at 331 ("[t]he restraint at issue was tailored to that need, being limited in time and scope"); *United States v. Hensley*, 469 U.S. 221, 235 (1985) (permissibility of *Terry* stop turns on "length and intrusiveness").

asked whether "a reasonable person would have believed that he was not free to leave."[4] Thus, questioning without more does not make an encounter a "seizure," at least so long as the citizen is free to walk away.[5]

Once a seizure has occurred, however, the inquiry becomes whether the seizure is "reasonable," *Brignoni-Ponce*, 422 U.S. at 878, which turns on "the nature and quality of the intrusion on individual rights," *Terry*, 392 U.S. at 24; *see id.* at 26 (law-enforcement interests must be balanced against "the sanctity of the individual"); *Brignoni-Ponce*, 422 U.S. at 878 ("the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers"). And, as explained above, where the seizure is not supported by probable cause, that intrusion may not be "more intrusive than necessary" to satisfy the law-enforcement interests

[4] *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984) (seizure occurs when there is "meaningful interference . . . with an individual's freedom of movement"); *Terry*, 392 U.S. at 16 ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); *id.* at 19 n.16 ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

[5] *See, e.g., Royer*, 460 U.S. at 497 (plurality) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."); *Bostick*, 501 U.S. at 437 ("[N]o seizure occurs when police ask questions of an individual . . . so long as the officers do not convey a message that compliance with their requests is required.").

justifying the detention in the first place. *Royer*, 460 U.S. at 504 (plurality).

For purposes of that inquiry, intrusiveness is not a function only of freedom of movement. "The Fourth Amendment . . . is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *Delgado*, 466 U.S. at 215 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). Unquestionably, interrogation constitutes an intrusion implicating Fourth Amendment interests: it is "mark[ed]" by "probing into an individual's private life and thoughts." *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

Petitioners' argument not only improperly blurs the inquiry into whether a seizure has occurred with whether that seizure is reasonable but also wrongly equates questioning of someone who is free to leave with custodial interrogation. As this Court has held, "detention for custodial interrogation — regardless of its label — intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Dunaway*, 442 U.S. at 216. The reason is plain:

> [C]oerced interrogation is a serious intrusion upon the sanctity of the person. It may inflict great indignity and arouse strong resentment. It may make the subject feel the target of the government's vast machinery, in grave legal peril, alone and without counsel. It may make the subject feel that dread consequences hang on his or her words. It may make the subject feel that silence is not an option.

Ganwich, 319 F.3d at 1121.

Indeed, in *Summers* itself, the Court distinguished (what now is called) *Summers* detention from the more intrusive "custodial interrogation" it had examined in *Dunaway*. *See Summers*, 452 U.S. at 702 n.15 (seizure that is "designed to provide an opportunity for interrogation" tends to "have coercive aspects likely to induce self-incrimination"). That is why the *Summers* Court made doubly clear that it was not approving a detention "likely to be exploited by the officer or unduly prolonged in order to gain more information." *Id.* at 701.

In sum, petitioners' theory both conflates disparate issues and undervalues the especially intrusive nature of questioning while in custody. Detention unsupported by full-fledged probable cause is a special accommodation allowed in recognition of particularly weighty law-enforcement interests. When officers avail themselves of this accommodation they are "treading on thin constitutional ice." *Ganwich*, 319 F.3d at 1124. They may not use it as an excuse for intruding upon Fourth Amendment protected privacy interests to an extent that is greater than necessary to satisfy the interests authorizing the intrusion in the first place.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL LATINO OFFICERS ASSOCIATION, THE NATIONAL BLACK POLICE ASSOCIATION, AND THE HISPANIC AMERICAN COMMAND OFFICERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae National Latino Officers Association ("NLOA") is a fraternal and advocacy organization with a membership of 10,000 uniformed and civilian employees, predominantly within city and state law enforcement agencies. The mission of the NLOA is to create strong bonds between immigrant communities, particularly Latino communities, and various law enforcement agencies, while promoting candid and productive communication. Over many years, the NLOA, composed primarily of Latino officers, has gained a great deal of respect and trust within immigrant communities by advising residents of their rights, fighting discrimination, and facilitating a mutual dependence between these communities and law enforcement. The NLOA has testified before Congress, and its members regularly participate in local city council meetings regarding issues of discrimination and law enforcement.

Amicus curiae National Black Police Association ("NBPA") is a nationwide organization of African-American police associations, with approximately 35,000 members in 140 chapters, dedicated to fair and effective law enforcement. The NBPA has helped develop a strategy for community policing, with the hope of creating a cooperative relationship between minority officers and the communities they serve, that will in turn lead to increased public safety. The NBPA also aims to improve the relationships between police departments and minority populations by evaluating the effect of policies on minority

[1] This brief was not authored in any part by counsel for either party. In addition, no person or entity other than *amici curiae* and their counsel made a monetary contribution to the submission of this brief. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

communities, recruiting minority police officers on a national scale, and teaching officers to act with professionalism and compassion in combating corruption, brutality, and racial discrimination.

Amicus curiae Hispanic American Police Command Officers Association ("HAPCOA") is the largest organization of Hispanic American command officers in the United States, with members in hundreds of law enforcement agencies. HAPCOA's members include chiefs of police, sheriffs, and police superintendents from around the country. HAPCOA's primary goal is to increase community involvement, understanding, and support through outreach efforts and the development of positive partnerships with other law enforcement associations, corporations, community groups, and non-profit organizations.

Amici are deeply concerned about the practical, real-world consequences this case could have for effective law enforcement. In particular, *amici* believe that Petitioners' suggested resolution of their first question presented – whether the police questioning of Respondent about her immigration status constituted an additional, unconstitutional seizure under the Fourth Amendment – is fundamentally oversimplified and invites a ruling unnecessary to a narrow disposition of this case. *Amici* thus write to inform the Court of important, negative policy consequences that would follow from a ruling authorizing or encouraging police officers to enforce immigration law as a caution against using this case to resolve this complex question. And, as the issue of the authority and propriety of police enforcement of immigration law was not argued or briefed in the lower courts, *amici* join Respondent in urging the Court to resolve this case on other grounds.

STATEMENT OF THE CASE

In this case, eighteen heavily armed officers of a police SWAT team executed a search warrant at Respondent Iris Mena's home where they believed the primary suspect in a gang-related drive-by shooting was living. The evidence at trial showed that at least one officer forcibly entered the locked bedroom where Respondent was sleeping, pointed a semi-automatic weapon at her face as she awoke, handcuffed her, and took her to a converted garage (J.A. 100-03) where she was detained until the two to three hour search of the premises was completed. J.A. 72; 192. During that detention, one of the police officers questioned Respondent, a lawful permanent resident, about her immigration status even though her status had no bearing on the criminal investigation that was the subject of the search. J.A. 106. When that officer, and the Immigration and Naturalization Service ("INS")[2] agent who accompanied the police (J.A. 159-60), demanded to see her immigration papers, Respondent replied that the papers were in a purse in her room. J.A. 106. The officer then obtained and searched the purse without her consent and handed the documentation to the INS agent. J.A. 106-07. The three other occupants of the premises were also questioned about their immigration status (J.A. 137), and one was taken into custody by the INS as a result of this questioning. J.A. 115-16. None of the occupants was asked about his or her connection to the suspect in the shooting or the gang to which he belonged.

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[2] Effective March 1, 2003, the Homeland Security Act of 2002 abolished the INS, transferring its functions from the Department of Justice to the Department of Homeland Security. *See* Pub. L. No. 107-296, § 471, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 291(a) (2002)). Unless otherwise specified, the within brief uses the former nomenclature, which was used by the court below.

The jury concluded that Petitioners, the two officers who oversaw Respondent's detention, had violated her constitutional rights. J.A. 255. The Ninth Circuit affirmed. *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003). Specifically, the court determined that "the heightened security measures" were not justified under the circumstances. *Id.* at 1263-64. It further found that the officer's questions about Respondent's immigration status and search of her purse for proof thereof also rendered her detention unreasonable. *Id.* at 1264-66. The issue of whether this questioning constituted a separate constitutional violation was not argued by either party, at trial or on appeal, and was not reached by the Ninth Circuit. *See generally* Resp't Br.

SUMMARY OF ARGUMENT

In arguing that Respondent's Fourth Amendment rights were not violated when they questioned her about her immigration status, Petitioners attempt to cast this case as a straightforward criminal procedure case and, accordingly, make several dangerously flawed assumptions about the appropriate roles of state and local police and federal immigration officers. Petitioners and the United States as *amicus curiae* contend that questioning individuals about their immigration status is part of routine police work and serves an important government interest. Pet'r Br. at 22-23; Br. for the United States as *Amicus Curiae* at 26-27 n.10. *Amici* respectfully disagree.

The federal government, recognizing that immigration officials and state and local law enforcement entities are not similarly situated, has expressly delegated immigration law enforcement authority to the states only in certain specified areas, and there is no evidence that the Petitioners possessed such authority here. Enforcement of

federal immigration law, which is overwhelmingly *civil* in nature, is not, and never has been, a function of state and local law enforcement agencies, whose primary charge is the enforcement of state *criminal* law. And, while the enforcement of immigration law by state and local police may serve an important *federal* government interest, it runs counter to important state and local interests. *Amici* submit the within brief to urge the Court not to rule on the first question presented by Petitioners and to thereby avoid harmful consequences resulting from state and local enforcement of federal immigration law, as enumerated below.[3]

First, a perception that police can enforce routine immigration violations would have a devastating impact on community policing, which has become a critical crime-fighting strategy and counter-terrorism tool. Community policing depends upon establishing relationships of trust between local police and members of the community, including communities with significant populations of undocumented immigrants. Police officers across the country depend upon these relationships to obtain necessary information in narcotics, murder, robbery, rape, and other traditional criminal investigations. Moreover, partnerships between police and communities, particularly immigrant communities, have become increasingly important in the effort to prevent future terrorist attacks. Those relationships would be jeopardized and immigrants would become fearful of reporting crimes and suspicious activity

[3] *Amici* therefore urge this Court to resolve this case on the second question presented: whether, under *Michigan v. Summers*, 452 U.S. 692 (1981), the Ninth Circuit erred in ruling that Respondent's detention was unconstitutional because she was initially detained at gun-point and handcuffed for the duration of the search. However, *amici* take no position as to how the Court ultimately resolves this second question.

if they believed police were enforcing federal immigration laws, whether on their own or hand-in-glove with the INS.[4]

Second, a ruling that in any way adopts or endorses the proposition that police officers have inherent authority to inquire about a person's immigration status would inevitably burden state and local law enforcement agencies, which lack the training and resources to navigate the notoriously complicated world of immigration law. Already scarce state and local resources should instead be reserved for fighting state and local crimes. Moreover, state and local enforcement of immigration law would invariably expose police officers to criticism and liability for racial profiling, a practice in which INS agents routinely engage. A ruling sanctioning or encouraging statutorily unauthorized police questioning about an individual's immigration status in an effort to enforce federal immigration laws would contribute to a disturbing trend favored by some federal regulators to devolve immigration law enforcement to states and localities – a trend that not only fundamentally misapprehends the appropriate jurisdictional spheres of federal and state law enforcement, but that also threatens to further burden already strapped local law enforcement agencies.

In sum, because Petitioners' first question presented masks significant complexities involving the appropriate jurisdictional spheres of federal and state law enforcement

[4] The fact that an INS officer, who would potentially have been authorized to interrogate Respondent about her immigration status, was brought along by Petitioners on this raid does nothing to ameliorate *amici*'s concerns. As the facts of this case make clear, it was a police officer who first asked about Respondent's immigration status and who then searched Respondent's purse for the documents verifying that status as part of an immigration enforcement effort. J.A. 106-07. In any event, as shown below, police cooperation with the INS in this manner would be equally harmful to the promotion of trusting relationships between immigrants and police officers.

authority, raises the possibility that local law enforcement efforts will actually be hampered by Petitioners' proposed resolution, and, as Respondent demonstrates, does not benefit from the development of a full record below, *see generally* Resp't Br., *amici* urge the Court to resolve this case on other grounds.

ARGUMENT

IMMIGRATION LAW ENFORCEMENT IS, FOR GOOD REASON, A FEDERAL FUNCTION AND AUTHORIZING STATE AND LOCAL POLICE TO QUESTION PERSONS ABOUT THEIR IMMIGRATION STATUS IN AN EFFORT TO ENFORCE IMMIGRATION LAW WILL UNDERMINE THE EFFECTIVENESS OF LOCAL LAW ENFORCEMENT.

A. ENFORCEMENT OF FEDERAL IMMIGRATION LAW IS NOT AN IMPORTANT STATE OR LOCAL GOVERNMENT INTEREST.

In support of their argument that Respondent's constitutional rights were not violated when the police officer questioned her about her immigration status, Petitioners assert that "ascertaining the identity of illegal aliens serves an important government interest" and that the questions were "particularly proper" under the circumstances. Pet'r Br. at 22-23. Petitioners further assert that a rule prohibiting local police from asking individuals such questions would "upset settled and important law enforcement practices." Pet'r Br. at 22. The United States as *amicus curiae* similarly warns against "hamper[ing] the ability of government officials" to obtain information from individuals about their immigration status. Br. for the United States as *Amicus Curiae* at 23.

Petitioners and the United States thus attempt to cast this case as a paradigmatic criminal procedure case in

which the interests of effective law enforcement must be balanced against the protections of individual liberty secured under the Fourth Amendment. Instead, however, this case implicates complex and increasingly prevalent issues related to the enforcement of federal immigration law. *Amici* thus urge the Court not to adopt the constrained perspective suggested by Petitioners and the United States in their proposed resolution of the first question presented or in any way to endorse the view that police possess inherent authority to enforce immigration law.

By claiming that enforcement of immigration law serves "an important government interest," Petitioners oversimplify the issues presented in this case in two important and related respects. First, the enforcement of immigration law may well be an important *federal* government interest, but it is not an important *state* or *local* government interest.[5] Congress' division of authority, as described below, reflects a sound understanding of the appropriate roles of local and federal law enforcement: local police understand and care about how to prevent and solve crimes within their jurisdictions but have neither the training nor the resources to undertake federal immigration law enforcement. Indeed, authorizing or otherwise

[5] This assertion is abundantly supported by the existence of state and local ordinances and statutes prohibiting the enforcement of federal immigration law by state and local officials. *See, e.g.*, H.R.J. Res. 22, 23rd Leg. 1st Sess. (Alaska 2003); Or. Rev. Stat. § 181.850 (2003); Anchorage, Alaska, Res. 223-2003 (July 15, 2003); Chandler, Ariz., Police General Order E-17 § 300 (Mar. 1, 1999); L.A., Cal., Special Order 40 (November 27, 1979); S.F., Cal., Code § 12H.2. (1989); Takoma Park, Md., Ordinance No. 2002-82 (Oct. 28, 2002); Takoma Park, Md., Ordinance No. 1985-63 (Oct. 28, 1985); Detroit, Mich., Local Resolution To Protect Civil Liberties (Nov. 27, 2002); Minneapolis, Minn., Mun. § 19.30 (2003); N.Y., N.Y., Res. No. 60 (Feb. 4, 2004).

encouraging state and local enforcement of immigration law would undermine the ability of officers on the street to perform their central and predominant function of fighting crime and protecting the communities they serve.

Second, questioning of suspects by local police can serve an "important government interest" when it is directed towards the enforcement of state *criminal* law. *See Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451, 2455-56 (2004) (police questioning about identity to investigate assault); *Florida v. Bostick*, 501 U.S. 429, 432-33 (1991) (police questioning to obtain consent to search for narcotics on bus); *Terry v. Ohio*, 392 U.S. 1, 5-7 (1968) (police stop and questioning to prevent armed robbery). However, it is hornbook law that being an undocumented or "illegal" alien is a violation of federal *civil* or *administrative* immigration law, enforceable by the INS through immigration courts. *See, e.g.*, Richard D. Steel, *Steel on Immigration* § 16:1 (2d ed. 2004) ("The immigration process, including removal, is civil. While removal involves both procedural and substantive similarities to the criminal process, it has been repeatedly held to be civil."); *see also* 8 U.S.C. § 1227 (1999 & Supp. 2004) (listing grounds of deportability as civil immigration violations); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . ."). Relatively few immigration violations are criminal in nature. *See* Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 618, 1118 (3d ed. 2002) (reporting that in fiscal year 1998, over 1.5 million noncitizens required to leave the United States did so by voluntary departure and about 93,000 noncitizens were ordered deported, whereas just over 21,000 noncitizens were criminally convicted of immigration violations) (citing INS 1998 Statistical Yearbook). State and local officers may enforce a narrow subset of those

violations, but only when expressly authorized to do so by Congress.[6] *See generally* Br. for the ACLU as *Amicus Curiae*. Thus, the interest of local police in the enforcement of what is predominantly civil immigration law is far narrower than that of the INS and is, in any event, substantially outweighed by its costs, as described below.

Furthermore, Petitioners casually suggest that all that is at issue in this case is "mere [police] questioning" "related

[6] It is unclear from the record whether the police in this case were acting under such authority. *See generally* Br. for the American Civil Liberties Union ("ACLU") as *Amicus Curiae*. In support of their casual suggestion that the officers in this case were actually investigating criminal activity, Petitioners cite 8 U.S.C. § 1304(e) (1999), Pet'r Br. at 25-26, which provides that an alien, including a lawful permanent resident, may be convicted of a misdemeanor for failing to carry his alien registration card, assuming such card has been issued to him. Even if state and local police have authority to enforce this provision pursuant to California law, and are not pre-empted from doing so under federal law, *see* Brief for the ACLU as *Amicus Curiae*, the provision is very limited in scope. *See United States v. Campos-Serrano*, 404 U.S. 293, 299-300 (1971) (holding that the purpose of section 1304(e) is to identify bearer as lawfully registered alien residing in the United States and to govern that alien's activities within this country under the immigration laws); *see also United States v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985) (stating that alien registration helps facilitate work of INS officials at border checkpoints). Petitioners thus improperly view this provision as a sweeping mandate to enforce any civil immigration law violation by asking individuals about their immigration status. *See Mountain High Knitting v. Reno*, 51 F.3d 216, 219 (9th Cir. 1995) (holding that "§ 1304(e) arrest power does not permit 'rounding up the suspects' *simply* in order to investigate aliens' immigration status").

Moreover, in order for the officers' suspicion about Respondent's potential violation of this provision to have been reasonable, the officers would actually have had to suspect that Respondent was a legal permanent resident who failed to carry her documentation. The context of their questioning and its characterization in Petitioners' brief, however, reveal their true suspicion: that Respondent was, like other residents of the house under search, actually an *undocumented* immigrant. Pet'r Br. at 23-24.

to identity" with minimal intrusion or consequence. Pet'r Br. at 15. However, this characterization masks what *amici* perceive is an attempt to obtain blanket approval of routine police enforcement of federal immigration law. As the circumstances of the aggressive and obviously planned SWAT team search and questioning in this case reveal, the police officers and INS agent were plainly intent on enforcing state criminal and federal immigration law. Indeed, this case highlights the troubling trend of devolving the enforcement of immigration law to states and localities. Just recently, and in contravention of long-standing U.S. government policy, *see* Memorandum from Seth Waxman, Associate Deputy Attorney, to the U.S. Attorney for the Southern District of California (Feb. 5, 1996), *available at* http://www.usdoj.gov/olc/immstopo1a.htm, the Attorney General suggested that state and local police officers possess "inherent authority" to enforce immigration law. *See* Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002) (transcript available at http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm). The Attorney General has also directed the Department of Homeland Security and the FBI to begin entering certain categories of civil immigration information into the FBI's National Crime Information Center database, thus inducing state and local officers who access the database millions of times each day to engage in the arrests of suspected immigration violators. *See National Council of La Raza v. Ashcroft*, No. 03-CV-6324 (E.D.N.Y. *filed* Dec. 17, 2003) (action to enjoin entry and dissemination of such information); *see also* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1094-95 (2004). *Amici* urge this Court to resist endorsing this dangerous trend when fashioning a ruling in this case in light of the substantial complexities

inherent in the Petitioners' first question presented, as well as the adverse policy consequences of allowing police to question persons about immigration status in an effort to enforce immigration law.[7] Accordingly, *amici* urge this Court to resolve this case on other grounds. *See supra* note 3, at 5.

B. AUTHORIZING LOCAL LAW ENFORCEMENT OFFICERS TO QUESTION INDIVIDUALS ABOUT THEIR IMMIGRATION STATUS IN AN EFFORT TO ENFORCE IMMIGRATION LAWS WOULD SIGNIFICANTLY HAMPER EFFORTS OF STATE AND LOCAL POLICE TO FIGHT CRIME AND TERRORISM.

Law enforcement agencies across the country have embraced community policing models in recognition of the importance of cooperation between police and the communities they serve in solving problems of crime and public safety. *See generally* Dennis J. Stevens, *Case Studies in Community Policing* (Prentice Hall 2001). In particular, "[t]he community policing approach to law enforcement seeks to address the causes of crime and reduce the fear of crime and social disorder through problem-solving strategies and police-community partnerships. A fundamental shift from traditional reactive policing, community policing strives to prevent crime before it occurs." Matthew J. Hickman and Brian A. Reaves, *Community Policing in Local Police Departments, 1997 and 1999*, U.S. Dep't of Justice, Bureau of Justice Statistics (Feb. 2001). Under this model, an entire community, rather than the police alone, takes responsibility for crime prevention and criminal law enforcement. *See, e.g.*, Jerome K. Skolnick & David H. Bayley, *The New Blue Line: Police Innovation in Six American Cities* 212 (Free Press 1986); *Bandera v. City of Quincy*, 220 F. Supp. 2d 26, 32 (D. Mass. 2002) ("Community policing encourages the community to maintain order and keep neighborhoods safe. By involving members of the civilian community to identify problem areas in the community and shape solutions, community policing recognizes that it is the members of the community who, as much as police officers, are responsible for safeguarding the welfare of their community.").

Indeed, in recent years, community policing has become the predominant law enforcement policy model at the state and local level. According to the Department of Justice,

> [s]tate and local law enforcement agencies had nearly 113,000 community policing officers or their equivalents during 1999, compared to about 21,000 in 1997. This included 91,000 local police officers in 1999, up from 16,000 in 1997 . . . [and] 64% of local police departments serving 86% of all residents had fulltime officers engaged in community policing activities during 1999, compared to 34% of departments serving 62% of residents in 1997.

Matthew J. Hickman and Brian A. Reaves, *Community Policing in Local Police Departments, 1997 and 1999*, U.S. Dep't of Justice, Bureau of Justice Statistics (Feb. 2001); *see also* Steven G. Brandl, *Reflections on the Criminal Justice System after September 11, 2001: Back to the Future: The Implications of September 11, 2001 on Law*

[7] *Amici* do not mean to suggest that police should never be allowed to inquire about a person's immigration status. There may well be certain limited circumstances, unrelated to enforcement of immigration law, in which such an inquiry would be appropriate. For example, as part of a domestic violence investigation, a police officer may need to know if the abuser threatened the victim with deportation. Police, however, should only be able to ask about a person's immigration status under such circumstances if the questioning is unrelated to the enforcement of federal immigration laws.

Enforcement Practice and Policy, 1 Ohio St. J. Crim. L. 133, 140 (2003) (noting that "[t]he community problem-solving era is considered to be the predominant style of policing today" and "[c]ommunity policing is the cornerstone of the community problem-solving era").

The community policing model depends heavily on fostering relationships of trust between immigrant groups and law enforcement agencies, and *amici* have devoted substantial efforts to building these relationships with a wide variety of immigrant communities. Evidence suggests that community policing has successfully lowered crime rates in immigrant communities. Department of Justice statistics show that although the non-fatal violent crime rate dropped 44% between 1993 and 2000 for the general population, it dropped 56% for Latino populations. Callie Marie Rennison, *Criminal Victimization 2000; Changes 1999-2000 with Trends 1993-2000*, U.S. Dep't of Justice, Bureau of Justice Statistics (June 2001); Callie Marie Rennison, *Violent Victimization and Race, 1993-98*, U.S. Dep't of Justice, Bureau of Justice Statistics (Mar. 2001). This decrease has been attributed, at least in part, to the growing trust between Latino communities and law enforcement officials. *See, e.g.*, Ricardo Alonso-Zaldivar, *Crimes Against Latinos Decrease*, L.A. Times, Apr. 8, 2002, at 11A.

Undocumented and even many documented immigrants fear deportation; that fear must be overcome in order for immigrants to communicate and cooperate with police. Studies show that immigrants have tended to underreport crimes – either as victims or witnesses – because they fear that interaction with police officers may lead to negative immigration consequences. *See* Robert C. Davis et al., *Access to Justice for Immigrants Who Are Victimized: The Perspectives of Police and Prosecutors*, 12

Crim. Just. Pol'y Rev. 183, 187 (2001) (reporting that a DOJ-sponsored study demonstrated that two-thirds of district attorneys and chiefs of police from the 50 largest cities believed that recent immigrants underreport crimes). Indeed, the President of the United States has recognized the basic reality that when undocumented immigrants "are victimized by crime, they are afraid to call the police, or seek recourse in the legal system." President George W. Bush, New Temporary Worker Program: Remarks on Immigration Policy (Jan. 7, 2004) (transcript available at http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html). Past experience also confirms that police enforcement of immigration laws will create a chilling effect among undocumented immigrants, making them afraid to approach police when they are victims of crimes and easy targets for those who prey on that fear.[8]

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[8] Several jurisdictions have reported such incidents. *See* Lesley Téllez, *Finding a Place to Turn; Police Seek to Ease Crime Victims' Fear of Being Deported*, Dallas Morning News, Dec. 11, 2003, at 1Q (reporting that in Lewisville, Texas, an immigrant witnessed a murder but refrained from contacting the authorities for several months because of fear of immigration-related consequences); Natashia Gregoire, *Police Appeal for Clues in Slaying of Mom, Son*, Tampa Tribune, July 22, 2003, Metro, at 1 (reporting concern of Tampa, Florida, police that Mexican immigrants who had knowledge about a double murder were afraid to come forward and police efforts to assure the community that the police have no interest in their immigration status); David Hench, *Volatile Cleaner Started Fatal Fire; Four Seng Thai Workers Fled the State After the Fire, Delaying the Work of Investigators*, Portland Press Herald, March 3, 2001, at 1A (reporting that in Portland, Maine, officials investigating a restaurant fire were unable to question the restaurant's Thai employees because the employees had fled the scene of the fire out of a fear that they would be deported); Mirta Ojito, *Captive in Queens; Neighbors' Response to Trouble is Silence*, N.Y. Times, July 21, 1997, at B5 (reporting that fifty-eight deaf Mexican workers who had been smuggled into the United States and were found living in virtual slavery and subject to beatings and rapes while trapped in small, crowded apartments in New York City, and their neighboring witnesses, were afraid to go to the police for fear of being deported).

Amici are further concerned that police questioning regarding immigration status will create an especially strong chilling effect among victims of domestic violence, given the prevalence of domestic violence in immigrant communities. *See* Robert C. Davis & Edna Erez, *Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System*, Nat'l Inst. of Justice: Research in Brief, May 1998 (reporting that "[d]omestic violence was the largest category of victimization reported by immigrant victims"). Congress itself has acknowledged this danger.

> One of the main purposes behind the Violence Against Women Acts in 1994 and 2000 was to make it possible for women and children who were victims of crimes to be able to report these crimes to law enforcement. Abusers often told their victims they would be deported and never see their children again if they reported the abuse to the police.

Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, But Not its Demise*, 24 N. Ill. U. L. Rev. 153, 207 (2004); *see also* 8 U.S.C. § 1154(a)(1)(A)(iii) (1999 & Supp. 2004); *id.* § 1154(a)(1)(B)(ii) (1999 & Supp. 2004). Battered immigrant women need to be able to access law enforcement entities without fear that they or their abusers will be deported. Police departments have implemented programs in an attempt to reach out to battered immigrant women and children; however, this progress will be reversed by local enforcement of immigration law. Craig E. Ferrell, Jr., *Immigration Enforcement: Is it a Local Issue?*, The Police Chief, June 2004.

Police also increasingly rely on immigrant communities for terrorism-related information in particular. Attorney General John Ashcroft believes that "immigrants [are] in an especially good position to learn of terrorist plots or witness unusual behavior among people in their community." Neil Lewis, *Immigrants Offered Incentives To Give Evidence on Terrorists*, N.Y. Times, Nov. 29, 2001, at 7B;

see also William Lyons, *Partnerships, Information and Public Safety*, 25 Policing 530 (2002) ("A successful war on terror depends on information."); *United States v. Khan*, 324 F. Supp. 2d 1177, 1181 (D. Colo. 2004) (noting that an alleged immigration violator was "a potential witness in an underlying terrorism investigation"). Similarly, President Bush, in promoting a proposed bill that would give certain undocumented workers lawful immigration status, stated that if immigrants are unafraid of deportation, they will report crimes more freely, allowing "[l]aw enforcement [to] be better able to focus on the true threats to our nation from criminals and terrorists." President George W. Bush, New Temporary Worker Program: Remarks on Immigration Policy (Jan. 7, 2004) (transcript available at http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html).

Likely recognizing the negative effect that local involvement in the enforcement of immigration laws would have on cooperation with the police, scores of jurisdictions have adopted policies prohibiting law enforcement officials from inquiring into a person's immigration status. *See, e.g.*, Or. Rev. Stat. § 181.850 (2003); Chandler, Ariz., Police General Order E-17 § 300 (Mar. 1, 1999); L.A., Cal., Special Order 40 (November 27, 1979); S.F., Cal., Code § 12H.2. (1989); Takoma Park, Md., Ordinance No. 1985-63 (Oct. 28, 1985); Detroit, Mich., Local Resolution To Protect Civil Liberties (Nov. 27, 2002); Minneapolis, Minn., Mun. § 19.30 (2003). In addition, the United States Congress has enacted provisions that reward undocumented immigrants with lawful status in exchange for valuable crime-related or terrorism-related information. *See* 8 U.S.C. § 1101(a)(15)(S) (1999 & Supp. 2004) (enacted by Violent Crime Control Enforcement Act of 1994, Pub. L. No. 103-322, § 130003, 108 Stat. 1796, 2024) (granting lawful status to persons who have critical information regarding "a criminal organization or enterprise" or "a terrorist organization, enterprise, or operation"); 8 U.S.C. § 1101(a)(15)(T) (Supp. 2004) (enacted by

Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107(e)(1), 114 Stat. 1464, 1474-75) (granting lawful status to victims "of a severe form of trafficking in persons"); 8 U.S.C. § 1101(a)(15)(U) (Supp. 2004) (enacted by Battered Immigrant Woman Protection Act, § 1513, 114 Stat. at 1533) (granting lawful status to persons subjected to "substantial physical or mental abuse" resulting from a number of crimes, including rape, torture, involuntary servitude, kidnapping, extortion, and assault). These provisions not only demonstrate Congress' view that criminal law enforcement interests are equally, if not more, compelling than immigration enforcement interests, but also plainly reveal its recognition that immigrants are more likely to come forward with valuable crime-related information if they do not fear immigration-related consequences.

Amici and countless police jurisdictions have spent years developing relationships of trust with their communities by dissociating themselves from immigration officials. *Amici* worry that even if only some officers engage in questioning to enforce immigration law, the effect of their actions will be sufficient to chill immigrant cooperation even in those jurisdictions where officers properly refrain from doing so. Accordingly, police officers, police departments, and others around the country have publicly expressed their fears that if local law enforcement officials become involved in enforcing immigration laws, their efforts to reach out to immigrant communities will be derailed.[9]

[9] According to a spokesperson for the International Association of Police Chiefs, "[i]f local police are seen as local immigration officials, there's a concern that immigrants won't report crimes, which will then lead to an increase in crime in communities." Lesley Tellez, *Police Seek to Ease Crime Victims' Fear of Being Deported*, Dallas Morning News, Dec. 11, 2003, at 1Q; *see also* Karen Brandon, *U.S. Weighs Local Role on*

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In addition, *amici* believe that immigrants, even legal immigrants, will be less likely to trust the police if they feel they are being targeted based on their race, religion, ethnic appearance, or accent. It is well documented that federal immigration officials routinely use tactics similar to racial profiling in enforcing immigration laws. *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 Wash. U. L.Q. 675, 688 (2000) (stating that "[r]ace profiling also remains part and parcel of the enforcement of a body of immigration law"). In the post-9/11 context, for example, the INS has targeted Muslim and Arab immigrants. *See, e.g.*, Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 Geo. Immigr. L.J. 63 (2002) (discussing the FBI and INS's use of racial profiling in Arab and Muslim communities in the fight against terrorism).

Immigration, Chicago Tribune, Apr. 14, 2002, Zone C, at 10; Mia Taylor, *Cobb Police Unit Combats Hispanic Gang Lure*, Atlanta Journal-Constitution, Dec. 12, 2002, at 1JF; Tim Steller, *Expansion of Foreigner Arrest Plan is Feared*, Arizona Daily Star, July 12, 2002; *Value, Legality Debated as Local Police Become Immigration Cops*, Hispanic Link Weekly Report (Los Angeles), June 9, 2003; Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. Times, Apr. 29, 2002, at A1; Louie Gilot, *Immigration Proposal Puts Burden on Police*, El Paso Times, Oct. 9, 2003, at 2A; Richard Abshire, *Scams Prey on Migrants: Non-English Speakers May Face Questionable Business Dealings*, Dallas Morning News, Aug. 27, 2003, at 1R; *HPD Policy on Aliens is Hands-Off: Status of Immigrants Viewed as Federal Issue*, Houston Chronicle, March, 3, 2003, at A15; Oscar Avila, *Bill Imperils Immigrants' Fragile Trust in Police*, Chicago Tribune, Mar. 31, 2004, Zone C, at 1; Michael Easterbrook, *Durham Resolution Galvanizes Advocates*, Raleigh News & Observer, Oct. 22, 2003, at B1; Bill Novak, *County May Stiff the Feds On Information About Immigrants*, Capital Times (Dane County, WI), Dec. 18, 2003, at 1B.

This Court has sanctioned limited reliance by INS officials on race or ethnic appearance in enforcing immigration laws, holding that such appearance can be a factor supporting the reasonable suspicion necessary to stop and question individuals based upon the belief they are in the country illegally. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975). In fact, INS officers admit to routinely relying on a person's "foreign appearance" as a factor in determining whether to make such stops. *See, e.g., United States v. Cruz-Hernandez*, 62 F.3d 1353, 1355-56 (11th Cir. 1995); *United States v. Franco-Munoz*, 952 F.2d 1055, 1056 (9th Cir. 1991). Petitioners, by stating that Respondent's Salvadorian accent was the reason for the officer's questioning about her immigration status, argue that this rule should be extended to apply to police officers. Pet'r Br. at 24 (citing *Brignoni-Ponce*, 422 U.S. at 886-87).

Amici find Petitioners' position disturbing. The sanctioned reliance on race by INS agents may have been justified because those agents are responsible solely for enforcing immigration law and preventing noncitizens from entering the country illegally. *See Brignoni-Ponce*, 422 U.S. at 878 ("The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border."). However, if local police officers engage in racial profiling in deciding to question persons about their immigration status, those officers will eviscerate the relationships that police departments have worked hard to develop with immigrant communities – relationships that are necessary to effectively enforce the thousands of non-immigration related crimes in their jurisdictions in general and to productively investigate terrorism-related crimes in particular. *See* William Lyons, *Partnerships, Information and Public Safety*, 25 Policing 530 (2002) (stating that racial profiling is counterproductive because

it makes it "more difficult for citizens in those communities with the information we seek to communicate effectively crime- or terror-related information, and thereby discourage[s] their willingness to work with the police").[10] Indeed, this Court has itself acknowledged the harms that can result when local law enforcement engages in racial profiling. *See Illinois v. Wardlow*, 528 U.S. 119, 135 n.9 (2000) (stating that "a recent survey of 650 Los Angeles Police Department officers found that 25% felt that 'racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community'") (internal citation omitted). The perception that local police engage in profiling as part of immigration law enforcement would also significantly undermine trust among immigrants who lawfully reside in this country and whose allegiance is manifestly critical to fighting the war on terror. *See* Michelle Waslin, *Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos*, National Council of La Raza, Issue Brief No. 9, Feb. 2003; Deborah

[10] Police officers have expressed similar concerns. *See, e.g.*, Michelle Mittelstadt, *U.S. May Let State, Local Authorities Enforce Federal Immigration Laws*, Dallas Morning News, April 3, 2002 (quoting an officer in San Joaquin County Sheriff's Office as saying, "[r]acial profiling . . . could intensify if police are tasked with upholding immigration laws"); Craig E. Ferrell, Jr., *The War on Terror's 'Absconder Initiative,'* Police Chief, Oct. 2002, at 12 (stating that "many local agencies are usually not equipped or trained to enforce immigration laws without running afoul of their state and local statutes, such as those prohibiting racial profiling"). In addition, public awareness of racial profiling by immigration agents or local law enforcement is evidenced by the existence of terms such as "driving while black" and "flying while Arab." *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999); Ellen Baker, Comment, *Flying While Arab – Racial Profiling and Air Travel Security*, 67 J. Air L. & Com. 1375 (2002).

Ramirez et al., *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, U.S. Dep't of Justice, at 4 (2000) (reporting that recent survey data confirms that there is "a strong connection between perceptions of race-based stops by police and animosity towards local and state law enforcement").

In sum, in asserting that enforcement of immigration law is an important government interest, Petitioners overlook that INS agents do not share the same interest as police officers in gaining the trust and cooperation of immigrant communities, and thus fail to recognize the grave dangers to the public safety that state and local enforcement of immigration law can pose. Accordingly, *amici* join Respondent in urging this Court to avoid reaching this complex and consequential issue when deciding this case.

C. BECAUSE STATE AND LOCAL LAW ENFORCEMENT AGENCIES HAVE NEITHER THE RESOURCES NOR THE TRAINING TO HANDLE THE COMPLEXITIES OF IMMIGRATION LAW ENFORCEMENT, THEY WOULD BE SIGNIFICANTLY BURDENED BY THE INEVITABLE CONSEQUENCES OF A RULING THAT AUTHORIZES OFFICERS TO ENFORCE FEDERAL IMMIGRATION LAWS.

Unlike the INS, states and localities are not properly situated, nor adequately equipped, to enforce federal immigration laws. A ruling that authorizes or otherwise encourages police officers to inquire into a person's immigration status as part of immigration law enforcement would divert already scarce state and local resources from current policing priorities and obligate police to master the intricacies of immigration law. In addition, such a ruling would put police officers at risk of liability for violating a

number of constitutional provisions, federal and state statutes, and state and local ordinances and resolutions – a risk not equally faced by INS agents. Therefore, any purported benefits from enhanced enforcement of federal immigration laws would be dramatically outweighed by the loss of resources devoted to traditional crime prevention efforts.

1. Scarce State and Local Resources Should be Reserved for State and Local Law Enforcement

Data uniformly demonstrate that since the events of September 11, 2001, cities and towns across America have experienced severe financial strain. Michael A. Pagano, *City Fiscal Conditions in 2003*, Research Reports on American Cities, at iv – vi (reporting data collected by the National League of Cities that demonstrate historic budget shortfalls and deteriorating financial conditions in U.S. cities and their expected continuation into the foreseeable future). These fiscal shortfalls have had a significant impact in the area of public safety, where demand for services has steadily increased since 2001. *Id.* at 6-10 (reporting a significant increase in public safety needs and the strain such needs are increasingly imposing on city budgets); *see also* Christy Whitehead, *Budget Cuts More Than Layoffs*, Law and Order, Aug. 2004, at 102 (quoting National League of Cities survey reporting that, in 2003, "thirteen percent of cities reported that they had to lay off police due to tighter fiscal conditions and budget cuts and one in three cities anticipates possible layoffs in the near future"); Christopher Hoene, Mark Baldassare, Christiana Brennan, *Homeland Security and America's Cities*, Research Brief on America's Cities, Dec. 2002, at 6 (finding, based on the surveys of 725 city officials, that "[a]mid already declining fiscal conditions, the additional public

safety costs incurred by cities place them in an increasingly precarious position"). For example, in January 2003, the U.S. Conference of Mayors found that cities have spent more than $2.6 billion on "'additional security costs' since the 2001 terrorist attacks." Mark Preston, *Funding Cuts Hit Cities from All Sides,* American City & County, Jan. 2003, at 12. The former President of the International Association of Chiefs of Police, Joseph Samuels Jr., explained the dire situation of many resource-starved agencies in the post-9/11 world:

> [The] lack of resources has affected their confidence, as very few agencies feel adequately prepared to prevent or respond to a terrorist act or other major disaster. Law enforcement professionals are supposed to serve as the guardians of America's communities, but it is difficult for them to perform their jobs when, currently, they do not feel they can protect their communities adequately or reassure their communities honestly.

International Association of Chiefs of Police Press Release, *Police Chiefs Offer Priority List of Anti-Terror Needs*, June 15, 2003, at 1.

Further deepening this crisis, the federal government has abandoned much of the funding of local policing initiatives undertaken in the 1990s. Eli Lehrer, *Less Money From Washington*, American Enterprise, Jan/Feb. 2004, at 57. In addition, proposed funding cuts for the Community Oriented Policing Services (COPS) and the Local Law Enforcement Block Grant (LLEBG) program will have a particularly detrimental impact on already beleaguered local policing agencies.[11]

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[11] Tom Cochran, Executive Director of the U.S. Conference of Mayors, explains, "[m]any cities use the COPS and LLEBG money to put additional police officers on the streets." *Cities, Towns Oppose Cuts*

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Amici are concerned about the ability of state and local police departments to assume the additional burden of policing immigration violations at the same time that municipalities are experiencing unprecedented burdens and the worst budget crises in a decade. Moreover, the federal government's failure to adequately support existing partnerships to fight terror and provide security indicates that states and localities will likely be left to shoulder the accompanying financial burdens on their own. These additional resources could only come from already scarce criminal law enforcement budgets. As this Court has acknowledged, "[a] police department, like any organization with limited resources, allocates its resources to activities most likely to result in the detection or prevention of crime." *California v. Rooney*, 483 U.S. 307, 323 (1987). State and local resources should be used to achieve state and local interests. The consequence of a ruling authorizing or otherwise encouraging local agencies to assume responsibility for immigration enforcement would be to further deplete the scarce resources devoted to the core local law enforcement duties of investigating state crimes and protecting local communities.[12]

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in Aid to Police, Crime Control Digest, Feb. 13, 2004, at 2. National League of Cities President John DeStefano Jr., Mayor of New Haven, Connecticut, has expressed a concern shared by *amici*: "[T]he federal government is doing away with the COPS and other pertinent grants to local governments. How can we guarantee public safety if the federal government walks away from this partnership?" Lance Davis, *Panel Discusses Impact of Budget Crisis on Cities*, Nation's Cities Weekly, June 2, 2003, at 1.

[12] Police departments across the country have publicly expressed concerns about the drain on resources that local enforcement of immigration laws would cause. As stated by an official of the Dallas Police Association, "[t]he strain on local police already is enormous, and to ask us to arrest and detain immigrants is something the federal government needs to address by funding the INS some more and hiring

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2. Authorizing Police Officers to Enforce Immigration Law Without Adequate Training Will Lead to Costly Mistakes and Expose Officers to Liability.

Immigration laws are indisputably complex. *See, e.g.*, *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing modern immigration law as "labyrinthine" and "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion"); *United States v. Oliveros*, 275 F.3d 1299, 1307 (11th Cir. 2001) (describing immigration law as "an area in which the law is unsettled, complex, and confusing"); *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity.") (internal quotation marks and citation omitted); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (noting "the striking resemblance between [immigration] laws ... and King Minos's labyrinth in ancient Crete"); *Domokos v. Hollander*, No. 97-C-6194, 1997 WL 570748, at *1 (N.D. Ill. Sept. 8, 1997) ("Immigration laws and their application present a particularly dense thicket, one that is essentially impenetrable to all lawyers other than those who practice

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additional personnel." Michelle Mittelstadt, *U.S. May Let State, Local Authorities Enforce Federal Immigration Laws*, Dallas Morning News, Apr. 3, 2002. Local law enforcement officials in several other jurisdictions have expressed this sentiment. *See, e.g.*, Sheila Burke, *Midstate Auth. Balk at Possibly Enforcing Immigration Laws*, The Tennessean, Apr. 15, 2002, at 7B; Sixto Molina, Editorial, *Immigration Role Not for Local Police*, Tucson Citizen, Oct. 15, 2003, at 4B; Dina Bunis and Minerva Canto, *Immigrants Worried, Coe Pleased by Proposal*, Orange County Register, Apr. 4, 2002; Thomas Ginsberg & Maria Panaritis, *U.S. Agents Limit Scrutiny of Illegal-Immigrant Arrests*, Philadelphia Inquirer, Sept. 9, 2003, at A1; Tony Coleman, *Measure Targets Immigrants' Fears*, St. Paul Pioneer Press, Dec. 27, 2003, at B1.

in that area of the law with great regularity. For a layman that density is total ...."). Accordingly, immigration agents undergo a rigorous, comprehensive training program that orients them to the complexities of federal immigration law and its enforcement. As the official Bureau of Immigration and Customs Enforcement website reports:

> The Immigration Enforcement Agent basic training course is an approximately 4-and-a-half month residential program, and includes instruction in both academics and physical training. Academics include training in the following subject areas: Immigration Law, Alien Removal Process and Procedures, Fraudulent Document Detection, Immigration and Naturalization Act Statutory Authorities (Detention, Arrest, etc.), Behavioral Science, Constitutional Law, Conspiracy Law, Criminal Law, Fugitive Operations, Civil Liberties and Liabilities and Spanish Language.

Immigrant Enforcement Agent, Bureau of Immigration and Customs Enforcement, *at* http://www.ice.gov/graphics/careers/invest/invest_iea.htm (last visited Nov. 3, 2004); *see also Lewis v. Smith*, 731 F.2d 1535, 1538 (11th Cir. 1984) (reporting that "the INS provides firearms training, Spanish lessons, familiarity with immigration laws and procedures and investigative techniques"). Such intensive training is important to ensure, among other things, that immigration agents do not wrongfully target a person who has a legal right to be in the United States.

Police officers, who receive no training in the intricacies of immigration law, are bound to make mistakes, exposing them to liability for their improper actions. Indeed, the federal government recognizes that adequate training of police officers is a prerequisite to granting them any limited, express authority to enforce immigration law. In enacting one of the narrow provisions that

expressly authorizes the Attorney General to enlist local officers to enforce immigration law, Congress specifically directed that those officers receive adequate immigration enforcement training. *See* 8 U.S.C. § 1357(g)(2) (1999) (requiring a "written certification that the officers or employees . . . have received adequate training regarding the enforcement of relevant Federal immigration laws"). This provision demonstrates Congress' recognition that enforcement of federal immigration law by state and local police without the proper training is fraught with danger. Such enforcement would force states and localities into a no-win situation: either they expend substantial resources to train officers in the complexities of immigration law or expend substantial resources defending their mistakes after they occur.

Moreover, as discussed above, racial profiling is a routine aspect of immigration law enforcement. *See* discussion *supra* Part B. *Amici* are concerned that the racial profiling likely to result from police enforcement of immigration law will also put officers at risk of liability and further burden states and localities. In particular, while it may be permissible to use race as one factor among others in enforcing immigration law, *see Brignoni-Ponce*, 422 U.S. at 886, *amici* fear that untrained police officers will engage in improper racial profiling by relying *solely* on characteristics such as skin color or a foreign-sounding accent in deciding whether to question a person about his or her immigration status, thus exposing themselves to liability for racial profiling under an array of constitutional provisions and federal statutes. *See, e.g.*, Lisa M. Seghetti et al., *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, Congressional Research Service Report for Congress, Mar. 11, 2004, at 234 ("[A] high risk for civil rights violations may occur if state and local police do not obtain the requisite knowledge, training, and experience in

dealing with the enforcement of immigration laws."); *see generally* David Rudovsky, *Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. Pa. J. Const. L. 296 (2001) (discussing the Fourth Amendment, the Equal Protection clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1983 as potential vehicles for challenging racial profiling). INS agents, who receive specialized training in immigration law enforcement, are far less likely to succumb to this impermissible practice.

In addition, numerous states and localities have adopted ordinances and resolutions prohibiting police officers – but obviously not INS agents – from engaging in racial profiling. *See, e.g.*, Ark. Code. Ann. § 12-12-1402 (Michie 2003); H.R.J. Res. 22, 23rd Leg., 1st Sess. (Alaska 2003); Cal. Penal Code § 13519.4(d)-(f) (West 2004); Conn. Gen. Stat. § 54-1l (1999); Ky. Rev. Stat. Ann. § 15A.195 (Banks-Baldwin 2001); Minn. Stat. § 626.8471 (2001); Mont. Code Ann. § 44-2-117 (2003); Neb. Rev. Stat. §§ 20-501, 20-504(1) (2004); Okla. Stat. Ann. Tit. 22 § 34.3 (West 2000); R.I. Gen. Laws § 31-21.1-2 (2002); Tenn. Code Ann. § 45-6-223 (2001); Tex. Crim. Proc. Code Ann. art. 2.131 (Vernon 1977); Wash. Rev. Code § 43.101.410 (2002); W. Va. Code § 30-29-10 (2002); Anchorage, Alaska, Res. 223-2003 (July 15, 2003); Berkeley, Cal., Res. No. 61,747-N.S. (Sept. 10, 2002); Boulder, Colo., Res. Expressing the Commitment of the City of Boulder to Civil Rights and Liberties and Acknowledging that the Boulder Police Department Already Incorporates Most of the Following in their Current Policies and Procedures (July 23, 2002); Denver, Colo., Res. No. 13 (Mar. 18, 2002); N.J. Exec. Order No. 127, 33 N.J. Reg. 2233(a) (May 23, 2001); Nev. Rev. Stat. 289.820 (2001); N.Y., N.Y., Res. No. 60 (Feb. 4, 2004). Unlike INS agents, police officers could be held liable under these state and local laws. Thus, the overall

risk of liability police officers face when they undertake the enforcement of federal immigration law is clearly greater than that faced by INS agents.

On balance, the significant costs associated with local enforcement of immigration law – measured by the strain on state and local resources and by the damage to police-community relations and public safety – nullify any purported benefits of pursuing this exclusively federal interest.

CONCLUSION

In light of the overlooked complexities inherent in the first question presented by Petitioners as well as the damaging consequences a ruling on this question could have on state and local law enforcement, *amici* join Respondent in urging the Court to decide this case on other grounds.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,
Petitioners,

v.

IRIS MENA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

1. Whether law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional "seizure" if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity.

2. Whether a two to three-hour detention of the occupant of a suspected gang safe-house while officers search for concealed weapons and other evidence of a gang-related drive-by shooting is unconstitutional because the occupant is initially detained at gun-point and handcuffed for the duration of the search.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] The enforcement of criminal law is one of the principal functions of *amici*'s members. *Amici* therefore have a compelling interest in the resolution of legal issues involving the application of the Fourth Amendment to the procedures used in executing search warrants.

Of particular concern to *amici*, the court of appeals held that when police officers encounter a non-suspect during the course of a lawful search of a premises incident to a violent crime, they cannot use "any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals." Pet. App. 9a. While the court implicitly acknowledged that the police are authorized to handcuff a non-suspect upon the initial encounter, the court further held that police are required to release a person from handcuffs once it becomes "clear" that the person does not pose an "immediate threat." *Id.*

In promulgating this rule, the court of appeals substituted its own judgment, arrived at "'in the peace of a judge's chambers,'" *Graham v. Connor*, 490 U.S. 386, 396 (1989) (other citation omitted), and with the benefit of hindsight, for that of reasonable police officers searching a residence occupied by gang members and a suspect in a drive-by shooting. Moreover, the court below failed to even consider the governmental interests in the safety of officers and occupants and preventing interference with the search and balance them against respondent's Fourth Amendment inter-

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[1] The parties have consented to the filing of this brief *amicus curiae*; their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

ests. Because the court failed to follow this Court's Fourth Amendment jurisprudence and its holding would seriously jeopardize officer and occupant safety and generate extensive litigation, *amici* submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

1. The Court has held "that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (footnotes omitted). While such a detention is a seizure under the Fourth Amendment, *Summers* expressly recognized that the governmental interests in officer and occupant safety and preventing interference with the search outweigh an individual's Fourth Amendment interests.

A police officer's authority to seize a person "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. The Court has further held that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Accordingly, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

The court of appeals disregarded these principles in holding that petitioners violated respondent's Fourth Amendment rights. The court below held that police cannot use any essential "heightened security measures" on a non-suspect encountered during the execution of a warrant. Pet. App. 9a. The court further held that petitioners violated the Fourth Amendment because they kept respondent handcuffed

after it "became clear" that she did not pose an "immediate threat." *Id.*

The court of appeals thereby substituted its own judgment, made "'in the peace of a judge's chambers,'" *Graham*, 490 U.S. 490 U.S. at 396 (other citation omitted), and with the benefit of hindsight, for that of reasonable police officers executing a warrant at a residence of violent gang members. Contrary to the views of the court below, the police, prior to entering a room, typically have no idea what they will encounter. It is constitutionally reasonable for the police to be prepared for the worst and have their weapons ready when, pursuant to a valid warrant, they enter rooms in a residence believed to be occupied by gang members and a drive-by shooting suspect.

The *Summers* Court recognized that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." 452 U.S. at 702-03. Securing the premises as quickly as possible by taking persons found therein into custody is fundamental to taking control of the situation. It is thus constitutionally reasonable for the police to use appropriate measures to control an adult found in a residence used by violent gang members.

Nor did the police violate the Fourth Amendment because they kept respondent handcuffed for the duration of the search. *Summers* expressly held that a valid warrant "carries with it the limited authority to detain the occupants of the premises *while a proper search is conducted.*" *Id.* at 705 (emphasis added). This holding clearly contemplated a search of "several hours" duration. *Id.* at 711 (Stewart, J., dissenting).

Indeed, a rule that requires the police to remove handcuffs while a search is ongoing would jeopardize officer and occupant safety. More than 80 percent of assaults on police officers are committed with hands, fists and feet. *See* U.S.

Dep't of Justice, FBI, *Law Enforcement Officers Killed And Assaulted: 2002*, 74. The court of appeals ignored that a detainee, even if unarmed, can suddenly attack police officers. Indeed, the court of appeals' rule could encourage criminals to act in a docile fashion to induce the police to remove their handcuffs, wait for the police to let their guard down, and spring a surprise attack. In addition, detainees could be harmed if police lose control of the situation.

Furthermore, the court of appeals' "immediate threat" rule will generate extensive litigation while doing little to advance Fourth Amendment interests. If this rule is upheld, every warrant execution during which police handcuff detainees could give rise to a lawsuit over whether a detainee posed an immediate threat and whether the police were prompt enough in removing the handcuffs. It is unreasonable to impose on the police the choice between being sued for damages if they fail to remove handcuffs or being injured if a detainee whose handcuffs have been removed becomes violent.

ARGUMENT

PETITIONERS ACTED REASONABLY IN DETAINING RESPONDENT DURING THE COURSE OF EXECUTING A SEARCH WARRANT AT PREMISES USED BY VIOLENT GANG MEMBERS

As an initial matter, *amici* agree with petitioners that respondent's Fourth Amendment rights were not violated when she was asked questions during her detention because "the mere questioning of an individual who has been lawfully seized" cannot "constitute an additional, unreasonable seizure." Pet. 9. As this Court has repeatedly stated, "mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *see also United States v. Childs*, 277 F.3d 947, 950 (7th Cir.) (en banc) ("[p]osing a question" to a person lawfully in police custody "does not meet the Supreme Court's definition of a seizure"), *cert. denied*, 537 U.S. 829 (2002). *Amici* incorporate by reference petitioners' arguments on this question, *see* Pet. Br. 15-23, and will not repeat them here.

Second, petitioners acted in a constitutionally reasonable fashion when they detained respondent in the course of executing a valid search warrant at her residence. The court of appeals erred in holding that petitioners violated respondent's Fourth Amendment rights because they initially pointed a weapon at her prior to handcuffing her and then kept her handcuffed while they executed a valid search warrant. Notwithstanding that the residence harbored violent criminals, the court articulated a new and troubling constitutional rule that when police confront a non-suspect in executing a search warrant, they cannot subject that person "to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals—such as physical roughness, threatening deadly force, and using handcuffs for an extended period." Pet. App. 9a. Equally disturbing, the court declared that because "Mena was not a suspect in the crime, the officers should have released her from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest – much less resist arrest 'actively.'" *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989) (footnotes omitted)).

As explained below, the court of appeals' holding is irreconcilable with this Court's Fourth Amendment jurisprudence, under which petitioners' conduct was reasonable. *See Graham*, 490 U.S. at 396-97; *Michigan v. Summers*, 452 U.S. 692, 705 (1981). The lower court's rule—that the police cannot use "heightened security measures" in dealing with non-suspects confronted during the execution of a warrant at premises believed to harbor violent criminals—cannot survive scrutiny under *Graham*. Indeed, to the extent the rule subjects the police to liability for pointing a weapon at an adult resident and physically controlling that resident to

handcuff her, the rule violates *Graham*'s admonition that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" that occurs within "'the peace of a judge's chambers.'" *Id.* at 396 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.)).

The court of appeals also held that the police are required to release a detainee from handcuffs even though a search is still ongoing if that person does not pose an "immediate threat." Pet. App. 9a. This Court should reject this rule which inevitably invites judicial second-guessing of police conduct that is clearly reasonable under the circumstances.

The Court has expressly recognized that the interest in protecting officer and occupant safety justifies the "authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. at 705. The great majority of assaults on police officers are committed by persons using their hands, fists, and feet. *See* U.S. Dep't of Justice, FBI, *Law Enforcement Officers Killed And Assaulted, 2002*, 74. Officers thus cannot assume that a detainee no longer poses a threat merely because she has been searched for a weapon. Nor should they be placed in the position of having to speculate as to whether a detainee might subsequently attempt to attack them. Moreover, the court of appeals' rule will generate extensive litigation over whether the police were prompt enough in removing the handcuffs and whether a person posed an immediate threat. The judgment of the court of appeals should therefore be reversed.

A. Petitioners Acted Reasonably In Detaining Respondent

The Court has previously recognized that the police effectuate "a 'seizure' within the meaning of the Fourth Amendment" when they detain a person on the premises while executing a search warrant. *Michigan v. Summers*, 452

U.S. at 696; *see also Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (seizure occurs when "by means of physical force or show of authority, [the police] . . . in some way restrained the liberty of a citizen"). The Court has instructed that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of '"the nature and quality of the intrusion on the individual's Fourth Amendment interests"' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

The Court has further recognized that the right "to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* at 396 (citing *Terry*, 392 U.S. at 22-27). Moreover, "[b]ecause '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case. . . ." *Id.* (citation omitted).

Most significantly, the Court has held that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citing *Terry*, 392 U.S. at 20-22). Because the standard assesses the reasonableness of police conduct "at the moment. . . . 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *Id.* (quoting *Johnson v. Glick*, 481 F.2d at 1033 (Friendly, J.)). Accordingly, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

The court of appeals failed to balance "the nature and quality of the intrusion on [respondent's] Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (citations and internal quotations omitted). Instead the court below placed undue emphasis on a portion of the *Graham* opinion which discusses the reasonableness of police conduct in a different context, that of an investigatory stop. *See* Pet. App. 8a-10a.

The court found it dispositive that respondent was not a suspect, that she did not "actively resist arrest or attempt to flee" and concluded that she "posed no 'immediate threat to the safety of the officers or others.'" *Id.* at 8a-9a (quoting *Graham*, 490 U.S. at 396). The court of appeals thus held that the police acted unreasonably because they pointed a weapon at her, "roughly jerk[ed] her off of her bed, march[ed] her barefoot through the rain into a cold garage, and [kept] her in handcuffs" for the duration of the search. *Id.* at 9a. This Court should reject the court of appeals' holding, which reflects "the 20/20 vision of [judicial] hindsight" rather than the requisite inquiry into Fourth Amendment principles. *Graham*, 490 U.S. at 396. Indeed, the court of appeals' reasoning is flawed for several reasons.

First, the court did exactly what *Graham* instructs a court not to do. It mechanically applied *Graham* to a different context, that of a detention during a search, and ignored *Graham*'s essential teaching—that the test of reasonableness "requires careful attention to the facts and circumstances of each particular case" and is to be "judged from the perspective of a reasonable police officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*

While *Graham* noted that the reasonableness of a use of force requires consideration of such factors as "the severity of the crime at issue," "whether the suspect poses an immediate threat" and whether the suspect "is actively resisting arrest or attempting to evade arrest by flight," *id.*, the Court articulated

these factors in a far different factual context. *Graham* did not address the measures which the police may reasonably employ when executing a search of a residence believed to harbor violent criminals. Rather, the case involved an investigatory stop, in which the police allegedly used excessive force and caused physical injuries which included "a broken foot, cuts on [the plaintiff's] wrists, a bruised forehead, and an injured shoulder." *See id.* at 389-90. In contrast, Mena did not allege physical injury. *See* Br. in Op. at 8. In this respect alone, the nature and quality of the intrusion suffered by Graham differs from that alleged by Mena.

The factors which *Graham* enumerated thus are properly understood as guideposts in the context which that case addressed. They are not particularly helpful in evaluating the reasonableness of police conduct in executing a search warrant of premises incident to a violent crime. Indeed, the courts below ignored the fundamental differences that exist between making an investigatory stop and executing a search warrant. While in both situations there is a strong governmental interest "in minimizing the risk of harm to the officers," *Michigan v. Summers*, 452 U.S. at 702, "the task performed by the officers executing a search warrant is inherently more perilous than is a momentary encounter on the street." *Ybarra v. Illinois*, 444 U.S. 85, 107 (1979) (Rehnquist, J., dissenting).

As a leading authority explains, "[t]he circumstances are quite different [in executing a warrant] than in an on-the-street context; the police, obligated to carry out the command of the search warrant, cannot simply avoid the suspect and conceal their suspicions of him[.]" 2 Wayne R. LaFave, *Search And Seizure: A Treatise on the Fourth Amendment*, § 4.9(e), at 645-46 (3d ed. 1996). When the police confront a suspect on the street, they can readily observe the suspect. Moreover, there are only a limited number of places where a

suspect can hide a weapon. Indeed, the police can choose to avoid the suspect altogether. *See id.*

In contrast, when the police execute a search of a residence, they are required to enter spaces that typically are not observable until entering. Upon preparing to enter a room, the police may have no idea of what they will encounter. In addition, in a residence there are a far greater number of places for a suspect and his associates to either hide a weapon or lie in wait.[2]

In executing a warrant at a residence used by gang members suspected of a violent crime, it is constitutionally reasonable for the police to prepare themselves for the worst and have their weapons at the ready when they enter the rooms of the residence. Indeed, the conduct which the court below found to be constitutionally objectionable appears to have lasted no longer than the time it took to take Mena into custody. It is clearly reasonable for the police to display a weapon when executing a search warrant at a residence believed to harbor violent gang members.

In *Summers* the Court held "that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises

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[2] In 2001, at least seven police officers were killed in the line of duty while assisting in the execution of a warrant at a residence. *See* U.S. Dep't of Justice, FBI, *Law Enforcement Officers Killed and Assaulted: 2001*, 48 (death of L.A. County sheriff's deputy while assisting federal ATF agents in serving search warrant); *id.* at 50 (death of Atlanta Police Department Narcotics Team member while serving a search warrant); *id.* (death of Jerome County, Idaho, sheriff's deputy while searching residence of suspected drug dealer); *id.* at 52-53 (deaths of two Jessamine County, Kentucky, sheriffs deputies who were murdered by 75 year old man while executing arrest warrant); *id.* at 55 (death of Prentiss, Mississippi, officer while executing search warrant for narcotics), *id.* at 60 (death of Travis County, Texas, deputy while executing search warrant for narcotics).

while a proper search is conducted." 452 U.S. at 705 (footnotes omitted). As the Court explained, when a warrant has been issued "[a] judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. . . . *The connection of an occupant to that home* gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant." *Id.* at 703-04 (emphasis added). Thus, *Summers* does not require that the police conduct a separate evaluation of whether each occupant they encounter in the course of executing a warrant poses an "immediate threat" before using necessary measures to compel cooperation and secure the premises.

The Court's "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. Moreover, there are other governmental interests that authorize police to both display and use force in executing a warrant. As the Court recognized in *Summers*:

> *Although no special danger is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.*

452 U.S. at 702-03 (footnote omitted) (emphasis added).

Securing the premises as quickly as possible by taking persons found therein into custody is fundamental to "exercis[ing] unquestioned command of the situation." *Id.* It was thus constitutional for the police to use a reasonable amount of physical force to control an adult found in a residence believed to harbor violent gang members. Contrary to the views of the court of appeals, the Fourth Amendment

did not require police officers to speculate as to whether Mena may have had ready access to a weapon or whether she was a gang member or sympathizer before taking necessary action to expeditiously detain her.

B. The Court of Appeals' "Immediate Threat" Rule Jeopardizes The Safety Of Both Law Enforcement Officers And Occupants Of Searched Premises And Does Not Advance Fourth Amendment Interests

The court of appeals implicitly conceded that it was reasonable for the police to handcuff Mena at the outset. *See* Pet. App. 9a; *see also id.* at 29a (Kleinfeld, J., dissenting from the denial of rehearing en banc) ("the panel apparently concedes that handcuffing her at the outset was permissible"). The court nonetheless created a new rule holding that the police acted unreasonably because "the officers should have released [Mena] from the handcuffs when it became clear that she posed no immediate threat and did not resist arrest—much less resist arrest actively." *Id.* at 9a.

The *Summers* Court expressly held, however, that a search warrant supported by probable cause "implicitly carries with it the limited authority to detain the occupants of the premises *while a proper search is conducted.*" 452 U.S. at 705 (emphasis added). The length of Mena's detention complied with this standard.

To be sure, *Summers* noted that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." 452 U.S. at 705 n.21. But contrary to the view of the court of appeals, Mena's detention was not so prolonged as to render it unreasonable. Indeed, as Justice Stewart observed in his dissent in *Summers*, "a detention 'while a proper search is being conducted' can mean a detention of several hours." 452 U.S. at 711 (Stewart, J.). *Summers* thus clearly contemplates that a detention of a

length such as occurred here is reasonable as long as the search is conducted in a diligent manner. *See id.* at 701 & n.14.

Indeed, the court of appeals' holding requiring the police to remove a detainee's handcuffs while a search is ongoing is problematic for several reasons. First, the rule begs the question of whether the police can use any sort of coercive measures in continuing to detain individuals found on the premises in which violent criminals reside.

Second, the rule would jeopardize the safety of both the police and occupants. FBI reports consistently show that over 80 percent "of assaults on law enforcement officers . . . were committed with personal weapons such as hands, fists, feet, etc." *Law Enforcement Officers Killed And Assaulted, 2002*, *supra*, at 74 (80.6%). *See also* U.S. Dep't of Justice, FBI, *Law Enforcement Officers Killed And Assaulted, 2001*, at 85 (80.2%); U.S. Dep't of Justice, FBI, *Law Enforcement Officers Killed And Assaulted, 2000*, i (81.7%). Moreover, nearly thirty percent of officers assaulted with personal weapons were injured. *See Law Enforcement Officers Killed And Assaulted, 2002*, *supra*, at 74. As these statistics demonstrate, keeping people handcuffed during a search is essential to officer safety.

The court of appeals' rule thus subjects police to a heightened risk of assault by denying them the authority to use reasonable measures to restrain potential assailants. It is unreasonable to impose on the police the choice between being sued for damages if they fail to remove a detainee's handcuffs or the risk of being injured if a person whose handcuffs have been removed turns violent.[3] Indeed, the court

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[3] While the majority of police officers murdered in the line of duty are killed by men, since 1993 a police officer has been murdered in the line of duty by a woman almost every year. *See Law Enforcement Officers Killed And Assaulted, 2002*, *supra*, at 42. Moreover, in 2002, at least

of appeals' rule could result in harm to both the assailant and other detainees because in the event of an assault, the police would be justified in using force for their own protection.

Furthermore, many criminals would eventually become aware of the court of appeals' rule and could use it to resist searches. Knowing the rule, criminals could act in a docile fashion to induce the police to remove their handcuffs, wait for the police to let their guard down and then spring a surprise attack. *See, e.g.*, page 13 n.3, *supra*. An assailant could gain control of the officer's weapon with disastrous consequences for both law enforcement officers and other persons on the premises.

Finally, the Court should reject the "immediate threat" rule because it will generate extensive and wasteful litigation while failing to advance Fourth Amendment interests. Under the rule, every warrant execution during which the police handcuff detainees could give rise to a lawsuit over whether a detainee posed an "immediate threat" and whether the police were prompt enough in removing a detainee's handcuffs. Litigation of the issues would usually require extensive discovery; the cases would typically raise issues of credibility that could only be resolved by trial.

58,000 police officers "were assaulted in the line of duty." *Id.* at 73. The Justice Department does not break down assaults on police officers by the gender of the attacker.

Indeed, making assumptions based on stereotypes has cost police officers their lives. For example, in November 2001, two officers of the Jessamine County, Kentucky, Sheriff's Office were killed and one was seriously wounded while attempting to serve an arrest warrant on a 75-year-old man. The officers allowed "the suspect, who appeared to be finally cooperating with the deputies, into his home to get clothes and shoes. Suddenly, the man reached under his bed and pulled out a .30 caliber semiautomatic rifle and began firing at the officers." *Law Enforcement Officers Killed and Assaulted, 2001*, *supra*, at 53.

Nor would recognizing these claims advance Fourth Amendment interests. True enough, being handcuffed when one has not committed a crime is an unpleasant experience. But being kept handcuffed when the police have lawful authority to detain one, *see Summers*, 452 U.S. at 705, is at most an incremental intrusion on one's Fourth Amendment interests. Indeed, it pales in comparison to such intrusions as "an arrest based on probable cause, [where] the wrong person was arrested," and "the mistaken execution of a valid search warrant on the wrong premises," both of which were held not to violate the Fourth Amendment. *Graham*, 490 U.S. at 396 (citing *Hill v. California*, 401 U.S. 797 (1971), & *Maryland v. Garrison*, 480 U.S. 79 (1987)). *See also Summers*, 452 U.S. at 701-02 ("The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself. . . . [B]ecause the detention in this case was in respondent's own residence, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station.") (footnote omitted).

As the foregoing demonstrates, the governmental interests in the safety of law enforcement officers and occupants and preventing interference with the execution of a search clearly outweigh the intrusion imposed on Mena by being handcuffed for the duration of the search. The court of appeals, however, failed to conduct any analysis of these respective interests. *See* Pet. App. 8a-10a.

In short, contrary to the views of the court below, the police acted reasonably in executing the search warrant at Mena's residence. The Fourth Amendment does not require police officers, who execute a valid warrant at premises used by violent gang members, to assume the risk that persons found on the premises will remain docile and cooperative throughout the search.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 03-1423

In The
Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; and BRIEF *AMICUS CURIAE* OF POLICE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND AND OTHER PUBLIC SAFETY ORGANIZATIONS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

The Police Officers Research Association of California Legal Defense Fund[1] (Fund) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Joining in this request are the following member public safety organizations of the Fund: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, North Dakota Troopers Association, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations and Wyoming Highway Patrol Association. Also joining in this request are the following non-member public safety organizations: National Association of Police Organizations, National Fraternal Order of Police, Sacramento County Deputy Sheriffs Association and Riverside Sheriffs Association. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was not obtained.

The Fund is an organization providing prepaid group legal services to peace officers for matters related to their employment. The Fund and its member public safety organizations serve peace officers throughout the western United States including the states of Arizona, California, Colorado, Montana, Nevada, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. The interest of the Fund and the public safety organizations arises because handcuffs are commonly used by peace officers to secure detained persons while executing a warrant to search for contraband in a residence. The analysis employed by the

Ninth Circuit in this case departs from the guidance provided by the U.S. Supreme Court in the case of *Michigan v. Summers,* 452 U.S. 692 (1981), and introduces confusion concerning the proper use of handcuffs to detain persons while executing a search warrant. The U.S. Supreme Court should reaffirm its guidance in *Summers*, and the appropriateness of using handcuffs during execution of a search warrant.

Respectfully submitted,

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STATEMENT OF INTEREST

The *Amici Curiae* are the Police Officers Research Association of California Legal Defense Fund (Fund) and other public safety organizations. The Fund's member public safety organizations are: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, North Dakota Troopers Association, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations and Wyoming Highway Patrol Association. The following non-member public safety organizations join in this brief: National Association of Police Organizations, National Fraternal Order of Police, Sacramento County Deputy Sheriffs Association and Riverside Sheriffs Association. The Fund is an organization providing prepaid group legal services to peace officers and public safety employees for matters related to their employment.[1] The Fund provides services to peace officers and public safety employees throughout the western United States including the states of Arizona, California, Colorado, Montana, Nevada, North Dakota, Oregon, Texas, Utah, Washington and Wyoming. The Fund employs a panel of attorneys, such as Garrettson, Goldberg, Fenrich & Makler, P.C., which represents over 90 law enforcement unions throughout the states of Oregon and Washington. The non-member public safety organizations represent law enforcement personnel at every level of

[1] Counsel for the parties did not author any part of this brief. The Fund made the entire and sole monetary contribution to preparation and submission of this brief.

crime prevention and investigation, nationwide and internationally. These organizations are active representative groups working to protect and secure the laws and work of their law enforcement members.

Petitioners have consented to filing this brief. Respondent has not consented to filing this brief.

The *Amici* strongly support the Petitioners. The decision in *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003) and the order denying rehearing en banc published at 354 F.3d 1015 (9th Cir. 2004) will adversely affect the safety, personal liability and employment relations of the members represented by the Fund and the public safety organizations. Furthermore, the decision in *Mena* will adversely affect the safety of detainees during the execution of search warrants for contraband in routine circumstances.

SUMMARY OF ARGUMENT

Peace Officers have a strong interest in maintaining clear and consistent guidelines on the use of handcuffs to secure detained persons during execution of a search warrant, similar to Officers Muehler and Brill in *Mena*. It is not an uncommon practice for peace officers, while executing a warrant to search for contraband in a residential building, to secure the occupants by handcuffing them and holding them in a central location during a search.

The officers in this case, Officers Muehler and Brill, did reasonably believe that their plans and actions in execution of the search warrant fit within the guidelines of *Michigan v. Summers*, 452 U.S. 692 (1981) case. There was

an apparent risk to officers when searching a residence for contraband, namely a gun used in a gang shooting. The officers had the reasonable expectation that gang members or sympathizers would be present. The potential for violence or secreting contraband was clear. Detaining occupants in handcuffs was necessary while the search was conducted, to reduce the safety risks to officers and detainees alike. No detainee was held in severe, humiliating or unnecessarily rigorous conditions. The officers' actions appeared consistent with existing case law in the Ninth Circuit and other circuits. As such, the officers are entitled to qualified immunity.

The Ninth Circuit decision in *Mena* treated handcuffing as an unusual case, and departed from the guidance of the U.S. Supreme Court in *Michigan v. Summers,* 452 U.S. 692 (1981). The *Mena* decision substantially diminishes the capacity of law enforcement officers to apply clear and workable rules from the *Summers* decision in routine circumstances, and diminishes the latitude law enforcement officers need to make reasonable decisions on detention conditions. As noted Professor Wayne R. LaFave has pointed out, if ad hoc determinations dominate the execution of a search warrant, it is difficult to comprehend and apply relevant factors correctly. The prospect for correct application, i.e., protecting liberty and privacy, are reduced. 2 W. LaFave, SEARCH AND SEIZURE sec. 4.9(e), pp. 649-650 (3d ed. 1996). The consequence is uncertainty and the potential need to employ greater force to maintain control of detainees. Handcuffing should be treated as one of the conditions of detention to be evaluated in the context of the *Summers* guidelines, and not treated as a separate or singular condition. This approach provides law enforcement officers clear and workable guidelines and sufficient latitude to carry out their duties while protecting

the liberty and privacy of detainees. The privacy and liberty interests of detainees can be protected within this framework. The Supreme Court should reaffirm the guidelines in the *Summers* case and their applicability to the use of handcuffs.

ARGUMENT

1. The Conditions of Detention in *Mena* Were Reasonable Under Existing Case Law.

In *Summers*, the U.S. Supreme Court established guidelines that allow law enforcement officers to adopt standardized procedures for the execution of warrants to search for contraband at residences and for the detention of occupants. The *Summers* decision did not address the use of handcuffs to detain occupants. However, the *Summers* decision did acknowledge the great importance of minimizing risk to the law enforcement officers, and did recognize the need for law enforcement officers to maintain unquestioned control of the situation. *Summers v. Michigan,* 452 U.S. at 702-703. Law enforcement officers often use handcuffs for this reason. Inherent in these guidelines is latitude for law enforcement officers to employ reasonable, reliable and available means to execute a search warrant. As Professor LaFave has pointed out, the Supreme Court produced a rule that did not depend significantly on ad hoc determinations where an officer is required to evaluate in detail the justification for detention or the extent of intrusion imposed on detainees. 2 W. LaFave, Search and Seizure sec. 4.9(e) p. 649 (3d ed. 1996). Rather, a neutral magistrate has already found probable cause when determining whether to issue a search warrant. Police focus their attention on the reasonable and

expeditious execution of a search warrant in identified and expected circumstances.

A. The Circumstances of the *Mena* Search.

The *Mena* search occurred in 1998. The facts are drawn from the Petition. Officers Muehler and Brill were investigating a gang-related drive-by shooting. One of the suspects was a gang member linked to a missing gun and known to have lived at the residence to be searched. The residence was a house that had been modified to accommodate many separate living quarters for many persons. Gang members were known to live there. The residence was possibly a gang "safe house." The officers obtained a warrant to search the entire residential property specifically for weapons and evidence of gang membership. Anticipating that gang members and weapons may be present, the residence was secured by a SWAT team. Four occupants were present, including plaintiff. All were first confronted by the officers with drawn weapons. The occupants were handcuffed and taken to a furnished garage used as a living unit where they were held in handcuffs until the search was completed in two or three hours. The search produced a gun, ammunition, drugs, baseball bats and gang paraphernalia.

Plaintiff appeared to be a young and apparently healthy woman of Hispanic appearance. She was confronted while she slept in her room. She was wearing a long-sleeved tee-shirt and sweatpants as pajamas. After she was taken to the garage she was given a jacket and shoes. She was allowed to move about the garage. The other detainees were there as well. Plaintiff never asked to have her handcuffs loosened. Plaintiff, and as the other

detainees, was asked about her immigration status. One occupant was found to be an illegal alien. It was known that gang members and their affiliates were often illegal aliens.

This case was a routine search for contraband in which the law enforcement officers had reasonable concerns for safety and the destruction or hiding of contraband, and reason to believe that one or more occupants of the residence may be gang members or affiliated with gang members.

B. The *Summers* Guidance.

For over twenty years law enforcement officers have planned operations for the execution of search warrants using the guidance provided by the U. S. Supreme Court in the case of *Michigan v. Summers,* 452 U.S. 692 (1981). *Summers* provided clear and workable rules with reasonable latitude to allow law enforcement officers to judge their actions and for law enforcement agencies to establish policies for execution of search warrants for contraband, including " . . . the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.*, 452 U.S. at 705. Under *Summers,* no particularized reasonable suspicion is required to detain an occupant.

The *Summers* court identified legitimate reasons for detention of occupants of the premises to be searched, including:

1. To prevent flight;
2. To minimize the risk of harm to officers;
3. To prevent the destruction or hiding of evidence; and

4. To facilitate an orderly and complete search.

Id., 452 U.S. at 702-703. The *Summers* court limited the period of detention to the time it took to conduct a "proper search" for contraband. *Id.*, 452 U.S. at 705. In this regard, the court was aware that a search could take several hours. *Id.*, 452 U.S. 711 (Stewart, J., dissenting).

The *Summers* court did not require evidence of a special danger to justify detention for safety reasons. The court said:

> "Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."

Id., 452 U.S. at 702-703.

Officers Muehler and Brill had reason to expect danger to the officers and the SWAT team. The officers had reason to make plans to minimize the risks based on the generalized risks identified in *Summers* and the particular risks known to the officers in this case. The officers expected to face multiple occupants, possible gang members or sympathizers, the likelihood of guns and drugs, and premises divided into many individual dwelling units. Securing the premises and maintaining security was a complicated matter.

The *Summers* court made it clear that it was adopting a categorical and reasonable rule, not a method of ad hoc analysis, to guide detention: "The rule we adopt today does

not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.*, 452 U.S. at 705, n. 19.

This approach has been justifiably praised. In his treatise, Professor Wayne R. LaFave praised the court's opting for a standardized procedure. He said:

> "This is because it reflects express recognition by the Court of the desirability of the standardized procedure alternative and also because it illustrates a very sound use of that approach. As pointed out elsewhere, standardized procedures are often to be preferred over ad hoc determinations because, in the long run, they will advance rather than reduce the protection of liberty and privacy. A legal principle which would produce the theoretically correct result 100% of the time but which is so difficult to comprehend and apply that at best it will be correctly used by the police only 75% of the time is not to be preferred over a standardized procedure which can be correctly applied in virtually all cases but which will produce the theoretically "correct" result only 95% of the time."

2 W. LaFave, Search and Seizure sec. 4.9(e), pp. 649-650 (3d ed. 1996).

Officers Muehler and Brill made a reasonable plan and executed their plan reasonably within the framework set forth in the *Summers* case and the facts known to them.

C. Search Procedures in *Mena* Were Reasonable.

Law enforcement agencies routinely develop plans for execution of search warrants. Handcuffing detainees may be planned if known circumstances make these actions reasonable at the time planning is done. Such circumstances include officer safety concerns where multiple persons may be detained; where weapons and drugs are expected to be present; and where the residence is unfamiliar and not easily secured. Court cases at the time of this search indicated that this approach was and is acceptable. Courts have described the procedures used by police departments to execute warrants to search for drugs, all without criticizing the use of handcuffs *per se*. In *U.S. v. Fountain,* 2 F.3d 656 (6th Cir. 1993), *cert. denied*, 510 U.S. 1014 (1993) the court held it reasonable and proportional for safety and evidence concerns to hold four men in a living room, handcuffed and lying on the floor while a warrant to search for drugs was conducted. In *People v. Ornelas,* 937 P.2d 867 (Colo. App. 1996) the court rejected an argument that the defendant was arrested as soon as he was handcuffed and relied on *Summers* to evaluate the reasonableness of the detention with handcuffs. In *Crosby v. Hare,* 932 F. Supp. 490 (W.D.N.Y. 1996) where the court held that absent special circumstances and without individualized suspicion it was reasonable for officers' safety that a naked woman (She was showering at the time police entered the premises.) be held first at gunpoint and then in handcuffs while officers conducted a security sweep of the residence before being allowed to dress and brought to the holding area in the residence. The issue was safety, not suspicion.

At the time of the *Mena* search, the Ninth Circuit had not considered handcuffing *per se* to be a unique issue. In

Franklin, the Ninth Circuit did not criticize the plan of the Portland Police Bureau to pat search and handcuff occupants of the residence and then detain them in a central location. Rather, the court found that the manner of detention was unjustified when an elderly disabled man, who was unable to walk or sit up without assistance because of multiple sclerosis, was kept in handcuffs that hurt him for a long period of time, wearing only a tee-shirt and with his genitals exposed to everyone in the living room where the detainees were kept. *Franklin v. Foxworth,* 31 F.3d 873, 876-878 (9th Cir. 1994). It was the pain, humiliation and indifference to the circumstances of the detainees, not the handcuffs that mattered.

The execution of the search warrant in *Mena* was reasonable in light of the cases existing at that time and in light of the circumstances reasonably known to officers Meuhler and Brill as stated above. Furthermore, the facts indicated that the search warrant was executed diligently, and that detainees were not subjected to pain, humiliation, or debility making their conditions unduly rigorous. Under the circumstances, the actions of Officers Meuhler and Brill were not clearly unlawful.

The court cases concerning the use of handcuffs have produced mixed results, but the actions of Officers Meuhler and Brill did not appear to exceed the guidelines in *Summers* or involve circumstances in cases where handcuffing was one of the factors leading to liability on the part of law enforcement officers. A comparison of the plaintiffs in the *Foxworth* and *Mena* cases shows apparently significant differences in the light of safety concerns for the officers. In *Mena,* the plaintiff was an apparently healthy young female without disability, who was able and allowed to move about the room where she was detained.

She was fully clothed, and she was provided with additional clothing. She did not complain of pain. In *Foxworth,* the plaintiff was a sick old man, scantily clothed and exposed to others in the room. He was unable to move without assistance and he was left in pain and discomfort even after he had asked for assistance. Officers Meuhler and Brill had no reason to believe they had crossed the line.

Officers Meuhler and Brill are entitled to qualified immunity. As the court pointed out in *Saucier v. Katz,* 533 U.S. 194 (2001) the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.*, 533 U.S. at 202.

2. Handcuffing Is a Reasonable Security Measure.

In 1996 Professor Wayne R. LaFave noted that the use of handcuffs to secure detained occupants may affect the length of detention. 2 W. LaFave, SEARCH AND SEIZURE sec. 4.9(e) (3d ed. 1996). In the 2004 supplement, Professor LaFave cited several cases from the Fifth and Ninth Circuits, including *Mena v. City of Simi Valley,* 226 F.3d 1031 (9th Cir. 2000) which might be contrary to decisions in the Second, Third and Sixth Circuits. Professor LaFave noted that some courts were concerned with use of handcuffs in circumstances that made their use onerous or unnecessary.

The *Heitschmidt v. City of Houston,* 161 F.3d 834 (5th Cir. 1998) and *Franklin v. Foxworth,* 31 F.3d 873 (9th Cir.

1994) cases expressed concern with the manner detention was carried out and the circumstances that could make detention unreasonably intrusive and unjustified. Handcuffing was only one of the circumstances causing concern to these courts. The courts were concerned with the total circumstances indicating unnecessary and onerous conditions imposed on the detainees.

In *Heitschmidt,* the detainee was required to sit on a bar stool in his residence for 4.5 hours while handcuffed. The warrant was issued to search for records of prostitution, i.e., evidence, not contraband. The police knew the detainee and expected him to be at his residence. They had no reason to consider him a suspect or to expect that he would interfere with the search, pose a safety threat, or flee. This was significant because police lured the plaintiff from his home on a police ruse, relying on their expectation that he would willingly cooperate with the police. The police then forcibly handcuffed him and brought him back into his home. In this case detention was unnecessary. *Heitschmidt v. City of Houston, supra,* 161 F.3d at 838-839.

In *Franklin,* an elderly, incontinent, seriously disabled man with multiple sclerosis, who could not walk or sit without assistance, was held for over two hours in handcuffs, dressed only in a tee-shirt with his testicles exposed to men and women in the living room where detainees were held. He complained about pain, but his complaints were ignored for a substantial period of time before police took action to relieve his distress or cover him. In this case, plaintiff suffered conditions that can only be described as harsh. *Franklin v. Foxworth, supra,* 31 F.3d at 876-878.

These cases demonstrate the special circumstances the *Summers* court may have anticipated in its footnote stating that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." 452 U.S. at 705, n. 21. The *Heitschmidt* court employed the *Summers* limits and found that "none of those factors that the Supreme Court used to explain why the detention in *Summers* was justified by legitimate police interests should be given any significant weight in this case." *Heitschmidt v. City of Houston, supra,* 161 F.3d at 839.

Latitude is necessary if law enforcement officers are to execute search warrants safely and efficiently in circumstances where they cannot know or anticipate all the circumstances they will face. That is a benefit of reliance on standardized procedures. The procedures will minimize ad hoc decision-making at the scene and reduce the chance of erroneous judgments by law enforcement officers. This in turn serves to maximize the safety of the officers and the detainees, because the officers retain control of the scene and avoid the necessity to escalate force to maintain control.

There is no significant reason to single out handcuffing as somehow suspect *per se*. Yet, that appears to be the direction the Ninth Circuit is heading. In *Mena,* the court held that " . . . because Mena was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals – such as physical roughness, threatening deadly force, and using handcuffs for an extended period." *Mena v. City of Simi Valley, supra,* 332 F.3d at 1263. For the first time, the Ninth Circuit identified handcuffs as a "heightened

security measure." Thus, it appears that in the Ninth Circuit handcuffing detainees is a special circumstance taking many searches out of the standardized procedures sanctioned by the *Summers* court. In doing so, the Ninth Circuit appears to have substantially downplayed the factors showing that the *Mena* case fits within the limitations set out in *Summers* and commonly recognized by other Circuit Courts.

The Ninth Circuit may have advanced the view that handcuffing *per se* is a unique case or circumstance requiring special justification in *Meredith v. Erath,* 342 F.3d 1057 (9th Cir. 2003). *Meredith* involved execution of a warrant by IRS agents to search for evidence of income tax code violations in a commercial building, not the search for contraband in a residence. However, agents discovered an occupant on the third floor of the building, which agents did not know was used as a residence. The occupant was handcuffed and detained until the search was concluded. With this decision, the Ninth Circuit announced that merely handcuffing a person and detaining her in handcuffs during a search for evidence was a violation of the Fourth Amendment, "absent justifiable circumstances." *Id.*, 342 F.3d at 1063. The court's ruling referred generally to execution of a search warrant for evidence and investigatory detentions. *Id.*, 342 F.3d at 1062. The Ninth Circuit also specifically noted that the *Summers* case did not involve handcuffing detainees. *Id.*, 342 F.3d at 1063.

The *Meredith* and *Mena* cases could be viewed as making handcuffing an unusual circumstance for which particularized suspicion against a detainee must first be established. Such an approach would make the standard procedures approach adopted in the *Summers* decision impractical in most cases, because law enforcement

officers will not have the level of precise and particularized information necessary to plan for execution of a search warrant in a safe and effective manner. Law enforcement officers will be compelled to make most of their decisions in the field rather than adopting a reasonable planned approach to detention decision and adapting to circumstances found in the field based on the application of clear and workable guidelines.

A. Inherent Risk in Execution of Search Warrant.

Any person who is not infirm and is in the milieu of guns, drugs and gangs, cannot be assumed to be harmless. Risk is inherent in the situation. As the court noted in *Michigan v. Summers,* 452 U.S. 692, 702-703 (1981) "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." So long as the search is carried out expeditiously and not prolonged for unrelated reasons, detaining occupants in handcuffs and questioning occupants may be prudent and reasonable, unless other egregious circumstances develop that clearly make the conditions of confinement unduly painful, humiliating, prolonged or unnecessary.

In the circumstances in the first search warrant executed in *United States v. Fountain,* 2 F.3d 656 (6th Cir. 1993) Fountain had time to partially dispose of drugs before he could be stopped. There were semi-automatic weapons also in the house. *Id.*, 2 F.3d at 659. Had Fountain chosen to pick up a weapon, the danger in executing the search warrant is obvious. Every stop and every approach to a residence bears with it the risk that a weapon will be used where persons and surroundings are

unfamiliar and not under the control of law enforcement officers.

B. Planning Execution of Search Warrant Designed to Avoid Risk to Officer Safety and Necessity to Employ Greater Force Against Detainees.

When planning the tactics for entry, officers must anticipate the risks identified in *Summers* (flight, destruction of evidence, safety, and interference with the search). It is necessary to maintain control of the place and the occupants, whose cooperation and passivity cannot be assured. It is reasonable to detain occupants in handcuffs rather than depend upon other potentially more violent means of maintaining security. After entry into the residence is secured, law enforcement officers still have limited information about the occupants. Where the premises are divided into many individual dwelling units occupied by strangers, securing the premises and persons is more difficult. Law enforcement officers cannot assume that a person who is passive while in handcuffs will remain so if released. The options to maintain control are limited. Law enforcement agencies have only limited numbers of personnel. Decisions must be made before executing the search warrant how many personnel to deploy, and that determines whether occupants can be held singly or must be held in a common area. If all occupants are brought together in a common area and remain without handcuffs, they can be guarded. However, if the occupants ignore voice commands, law enforcement officers have little choice but to escalate to the use of force. The range of force ranges from hands-on physical restraint to the use of weapons of moderate force, such as a taser, pepper spray or a baton, to deadly force. The point of

planning for execution of a search warrant, however, is to avoid circumstances that require the escalation of force and to prevent loss of control.

C. Handcuffing is a Practical Option.

Handcuffing detainees is merely one of the conditions of detention to be evaluated according to the guidelines in *Summers*, and law enforcement officers should have reasonable latitude to make judgments on the scene and at the time of the search. Handcuffing detainees is often the most practical option. In search warrant cases involving handcuffing detainees, one does not find examples of moderate to deadly force being used. The reason is that law enforcement officers maintain control of the situation.

In contrast, one can consider the use of deadly force in chase cases. These cases demonstrate the contrast between the containment of a person and actual control of a person. In *Pace v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002) the suspect engaged police in a hazardous high-speed chase, and he had used his vehicle. He was trapped in a cul-de-sac, but remained in his car with the engine running. The police approached him with weapons drawn and ordered him to get out of his car. The suspect did not do so. Within moments an officer fired on the suspect, and the car began to move forward. The court held that the police were entitled to qualified immunity because no clear law put the police on notice that their use of force was unlawful in these circumstances. *Id.*, 283 F.3d at 1282-1283.

In *Thompson v. Hubbard*, 257 F.3d 896 (8th Cir. 2001) the police chased a suspect in an armed robbery on foot. The suspect was ordered to stop, but he reached below his waist with his back to the officers. The officers' view was

obscured, and they shot and killed the suspect. No weapon was found. The court held that the officers were entitled to qualified immunity because it was not constitutionally required that an officer set eyes upon a weapon before employing deadly force. *Id.*, 257 F.3d at 898, 899.

In *Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992) the court granted qualified immunity to a police officer who had shot a killed a suspect in a high-speed vehicle chase after the police blocked the suspect in his vehicle in a dead end street. The suspect backed his vehicle up and then moved forward as if to ram or go around the police vehicle. The court found that it would not second guess a police officer required to make a split second decision on the scene whether to stop a suspect or not. *Id.*, 954 F.2d at 346-347.

These cases involve suspects who arguably had demonstrated a risk to officer safety, and not merely persons detained during execution of a search warrant. But the contrast between confinement and control is instructive. Even when a person is confined in a narrow area, he or she can pose a risk to officer safety. Once verbal warnings are ignored, the situation escalates quickly to the use of force. The situation becomes immediately more dangerous.

If the use of handcuffs to maintain control of detainees is narrowly restricted, law enforcement officers will be under increased pressure to use force to maintain or regain control of detainees in close proximity to officers. The risk of error and overreaction will be greatly increased. Having given up control for containment, the options for law enforcement officers are only for greater use of force. Unlike chase cases, where law enforcement

officers may have the option of letting a suspect flee, law enforcement officers executing a search warrant have no such option. The issue is not whether the occupant is a known suspect. Rather, the issue is avoiding the risk that force must be employed. The safety of the officers and the occupants must be given priority.

A sufficient number of cases have developed to demonstrate that the standardized procedural approach set forth in the *Summers* decision is sound and can accommodate consideration of the conditions of confinement, including handcuffing detainees, without immediate resort to the "unusual case" exception. It is also apparent that handcuffing is only one of many circumstances taking the case outside the *Summers* limitations.

CONCLUSION

This Court should reaffirm the standardized procedural approach adopted in *Summers,* and establish that handcuffing detained persons occupying a residence during a search for contraband pursuant to a valid search warrant is not a special circumstance or unusual case *per se*. Rather, handcuffing, as all other conditions of detention, must be evaluated according to the guidelines in *Summers*. As a matter of public policy, occupants and law enforcement officers will be better served by clear guidelines. Cases involving egregious circumstances, such as those found in the *Heitschmidt* and *Franklin* cases, will remain unusual cases where the guidelines of the *Summers* decisions have been clearly exceeded.

This approach is consistent with the purposes underlying the qualified immunity defense, which is intended to

provide law enforcement officers with some reasonable margin for error so they may carry out their duties without undue fear of civil liability.

For the reasons stated herein, the Fund and the public safety organizations respectfully request that this Court find that the conduct of this search fit within the *Summers* limitations, including the use of handcuffs, and Officers Meuhler and Brill are entitled to qualified immunity.

Respectfully submitted,

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